Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Can a collective action under the Fair Labor Standards Act be maintained when the employer's liability turns on a statutory exemption that must be litigated individually based on "all the facts in a particular case" (29 C.F.R. § 541.700(a))?

PARTIES TO THE PROCEEDINGS

Petitioner Family Dollar Stores, Inc. has no parent corporation. No publicly traded corporation owns 10 percent or more of Family Dollar's stock.

The four named Plaintiffs who are Respondents here are:

Janice Morgan
Barbara Richardson
Cora Cannon
Laurie Trout Wilson

A complete list of the 1,424 Respondents is included at App. 150a–72a.

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PETITION FOR A WRIT OF CERTIORARI

The Fair Labor Standards Act sets minimum wages and maximum hours for workers employed in interstate commerce. The FLSA contains a statutory mechanism that allows one employee to sue collectively for all employees who are "similarly situated." 29 U.S.C. § 216(b). Since 1938, when Congress enacted the FLSA, this Court has never explained what "similarly situated" means or otherwise suggested what sorts of factors should govern certification of a collective action under the FLSA. As a result, certification and decertification of FLSA collective actions, particularly those involving overtime exemptions, has become increasingly unpredictable. Employers in turn have become afraid to litigate these actions to judgment. Rather than risk liability to thousands of employees based on the outcome of one collective jury trial, employers typically choose to settle—often for millions of dollars.

This case arises from one of the few FLSA collective actions to proceed through a jury trial to judgment. It involves 1,424 retail store managers who claim that Family Dollar Stores should have paid them an hourly wage plus overtime, rather than a salary. The case resulted in the largest jury verdict in Alabama in 2006. 16 ALA. L. WEEKLY No. 6, at 1 (Feb. 9, 2007). The judgment against Family Dollar exceeds $35 million. Family Dollar's petition asks the Court to decide whether this case was properly certified and maintained as a collective action under § 216(b). The specific question presented is whether an FLSA collective action can be certified where, as here, the employer's defense turns on an individualized exemption that, under the

governing FLSA regulations, must be "determined on a case-by-case basis" (29 C.F.R. 541.106(a)) based on the facts in each "particular case" (*id.* § 541.700(a)).

Most courts have held a collective action cannot be used when the employer's defense rests on an individualized exemption. But the Eleventh Circuit split from this view, holding that Family Dollar's exemption defense could be adjudicated collectively. Although the split here is between one circuit court and numerous district courts, this is a compelling case for certiorari. The Eleventh Circuit's decision sets a pro-employee precedent, making it the nationwide forum of choice for FLSA collective-action litigation. Those interested in bringing massive wage-and-hour cases will file suit in a district court within the Eleventh Circuit, rather than in one of the less hospitable district courts elsewhere. Accordingly, no traditional circuit split will develop. Instead, employees will simply file suit within the Eleventh Circuit on behalf of all supposedly "similarly situated" employees nationwide.

The Court should grant review to provide long-needed guidance to the lower courts on when FLSA collective actions should be certified or decertified. This procedural issue raises due process concerns whenever an employer like Family Dollar is held liable for millions of dollars in back wages to thousands of employees based upon the live testimony of only a handful of plaintiffs. The issue also has important practical ramifications on wage-and-hour litigation nationwide. Certiorari is warranted now.

Opinions Below

The Eleventh Circuit's opinion (App. 1a–119a) is published at 551 F.3d 1233. The District Court's collective action certification opinions (App. 124a–39a), judgment (App. 122a–23a), and amended judgment (App. 120a–21a) are unpublished.

Jurisdiction

The Eleventh Circuit entered its judgment on December 16, 2008. App. 1a. Justice Thomas granted Family Dollar an extension to file this petition until April 15, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutes and Regulations Involved

Section 216(b) of U.S. Code Title 29 provides in relevant part:

> An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

Section 207(a)(1) of U.S. Code Title 29 provides in relevant part:

> [N]o employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 213(a) of U.S. Code Title 29 provides in relevant part:

> The provisions of sections 206 . . . and section 207 of this title shall not apply with respect to—
>
> (1) any employee employed in a bona fide executive, administrative, or professional capacity . . . .

Two sets of regulations apply to this case. *See* App. 70a. The regulations pertinent to the FLSA's executive exemption (29 C.F.R. §§ 541.1, .102, .103 (2003); 29 C.F.R. §§ 541.100, .102, .105, .106, .700 (2006)) are set out in the Appendix (App. 140a–49a).

STATEMENT OF THE CASE

1. Family Dollar is a small-box retailer with operations nationwide. App. 5a. Through its network of more than 6,000 stores, Family Dollar sells a variety of products, including basic groceries, clothing, hardware, household items, automotive supplies, general merchandise, and seasonal goods. *Id.* Each store is a profit center generally located in a strip mall or a stand-alone building. Doc. 251 ¶5. Consequently, the stores are unique in size and configuration, with sales floors as small as 3,700 square feet to as large as 12,300 square feet. *Id.* Individual store sales vary, from $210,000 to over $4 million annually. *Id.* ¶6.

A store generally is staffed with one salaried store manager, at least one hourly assistant manager, and two or more hourly sales associates. *Id.* ¶10; DX2324. The store manager is the highest ranking employee in a store. He or she is responsible for supervising the hourly employees, ensuring the store complies with Family Dollar standards, ordering weekly inventory, completing company paperwork, responding to emergencies, maintaining customer service, and making daily bank deposits. App. 24a–27a; Doc. 715 at 117–21. Family Dollar's sales transactions are predominantly in cash, so the store manager must protect large quantities of currency. Doc. 715 at 121. The store manager must also secure store inventory, which ranges from $100,000 to $390,000. Doc. 251 ¶6. In short, the store manager is the on-site executive responsible for the daily operation of what can be a substantial retail operation. App. 23a.

Since its founding in 1959, Family Dollar has always classified its store managers as exempt under the FLSA. Doc. 226 Ex.A ¶3. The store manager is the only exempt employee paid a salary at the store level. Doc. 251 ¶11. From 1999 to 2004, store manager salaries ranged from $400 to $1,100 weekly, or $20,800 to $57,200 annually. *Id.* Store managers are also the only store-level employees eligible for additional benefits such as sick pay and a bonus. Doc. 685 at 242–43. Bonuses are based on controllable store profits and range from hundreds to thousands of dollars. *Id.*; Doc. 251 ¶ 11.

The store manager reports to a district manager. A district manager has between 10 and 30 stores in a district. App. 23a–24a. Family Dollar has only 380 district managers for more than 6,000 stores. App. 23a. Some districts cover a single metropolitan area (as small as 20 square miles), while other districts span multiple states (up to 32,000 square miles) or have stores spread as far as 200 miles apart. App. 24a; Doc. 251 ¶8; Doc. 715 at 111. A district manager may visit a particular store once a week, once a month, or less frequently. App. 43a n.22; SA-66–82. The district manager's visit can last anywhere from 15 minutes to 2 hours. Doc. 683 at 171–72; Doc. 685 at 103. Otherwise, the district manager communicates with the store manager via phone and email. App. 43a.

Like other national retail chains, Family Dollar has adopted policies and procedures to make a shopper's experience consistent from store to store. App. 24a. For instance, Family Dollar designs "schematics" keyed to store size that determine where products should be placed on the shelves. App. 30a. The store manager is

responsible for ensuring that the store is set up according to the schematic and for updating the schematic according to company directives. App. 25a. Family Dollar has also instituted comprehensive human resources policies. App. 45a–48a. Due to the extensive federal and state regulation of employment, such policies are necessary to ensure adequate corporate oversight of significant decisions such as hiring, promotion, or firing. Doc. 685 at 204–14, 232–33.

2. Two store managers in Alabama sued Family Dollar under the FLSA, claiming they were improperly classified as exempt. App. 5a. The case was filed as a "collective action" under 29 U.S.C. § 216(b), which allows plaintiffs to sue on behalf of themselves and other "similarly situated" employees. App. 6a. In contrast to a class action under Federal Rule of Civil Procedure 23(b)(3), an FLSA collective action requires any employee who wants to become "a party plaintiff" to opt into the case by giving "consent in writing." § 216(b).

The district court conditionally certified the case as a collective action and notified over 12,000 current and former Family Dollar store managers nationwide. App. 10a–11a. Ultimately, 1,424 Plaintiffs opted into the case. App. 15a n.5.

The case proceeded through discovery. The District Court allowed Family Dollar to depose only 255 of the Plaintiffs. App. 13a–14a. The court allowed Plaintiffs' counsel to designate the majority of the Plaintiffs that were deposed. App. 13a.

3. Family Dollar moved to decertify the collective action. App. 15a. It argued that the District Court had to decertify the collective action because the Plaintiffs' managerial duties varied widely and because the executive exemption is inherently individualized. App. 15a–16a. In support, Family Dollar submitted the Plaintiffs' depositions (Doc. 230), along with charts summarizing numerous factual differences among the Plaintiffs (Doc. 255 Exs.1–3).

Under the governing regulations, the FLSA's executive exemption turns on a number of individual factors that Family Dollar used to show Plaintiffs' dissimilarity. Those regulations define "management" to include:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the[] work [of employees]; maintaining [] production or sales records for use in supervision or control; appraising [employees'] productivity and efficiency for the purpose of recommending promotions or other changes in [] status; handling [employee] complaints and grievances[;] disciplining [employees]; planning the work; determining the techniques to be used; apportioning the work among the [employees]; determining the type of . . . merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the [employees] [or] the property.

29 C.F.R. § 541.102(b) (2003); *id.* § 541.102 (2006) (minor differences shown in brackets).

Family Dollar argued that the deposition testimony on these managerial duties showed that the Plaintiffs were not "similarly situated." App. 15a–16a. The Plaintiffs' testimony about their managerial duties varied significantly, depending on whether the store was small or large, was rural or urban, and had few or many employees. Charts of the deposition testimony revealed dissimilarity across all the relevant management criteria (SA-42–64) as well as the degree of oversight by district managers (SA-6–40). (These charts are included in a supplemental appendix provided with the petition.)

The depositions of two Plaintiffs illustrate these differences. *See* Doc. 250 at 25–26. Plaintiff Krista Allen was a Family Dollar store manager in a large urban store in Baltimore, Maryland. She testified that she exercised *all* of the relevant management functions of an exempt employee. *See* SA-42, line 3. She could hire, fire, and discipline employees; she made recommendations regarding hiring, firing, discipline, and promotion; she interviewed potential hires; she trained new employees; she set or adjusted the hours of work for store employees; she directed employee work; she maintained production and sales records; she appraised the productivity and efficiency of her employees; and she planned their work. *Id.*; SA-66, line 3. Allen testified that, when she was in the store, she was running the store and supervising employees all the time. Doc. 230 (K. Allen Dep.) at 59, 140.

Plaintiff Angela Turner was the manager of small rural stores in Chatham and Butler, Alabama. She testified, in sharp contrast to Krista Allen, that she exercised *none* of the relevant management functions of an exempt employee. *See* SA-60, line 229. She could not hire, fire, or discipline employees; she did not make recommendations regarding hiring, firing, discipline, or promotion; she did not interview potential hires; she did not train new employees; she did not set or adjust the hours of work for store employees; she did not direct employee work; she did not maintain production and sales records; nor did she appraise the productivity and efficiency of her employees. *Id.*; SA-81, line 229. According to Turner, only her district manager exercised managerial authority. Doc. 230 (A. Turner Dep.) at 75. She testified that, when she was in the store, she was not responsible for any other employee. *Id.* at 80–81.

Family Dollar argued that a Plaintiff like Turner, who answered "No" to every question concerning the managerial duties, could not adequately represent a Plaintiff like Allen, who answered "Yes" to the same questions. Family Dollar argued that the disparate testimony of all 255 deponents demonstrated that no one Plaintiff's testimony was truly representative of any other's. Doc. 250 at 26. Plaintiffs own expert agreed that each store manager must be examined "individually to see if the exemption applies." Doc. 230 (Belt Dep.) at 221–22. A section taken from the middle of Family Dollar's deposition chart shows the dissimilarity.[1]

[1] The entire chart can be found at SA-42–64. The deposition page references used to create the chart follow, at SA-66–82.

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
125	LaBonte, James	Y		Y		Y	Y	Y	Y	Y	Y	Y		Y	Y
126	Land, Terry	N	N	N	Y	Y	Y			N	N	N			
127	Lane, Lori		N	N	N	N	N	N	Y	Y	Y	N	Y	N	N
128	Lee, Alvin	N	N	Y	Y	Y	Y		Y	Y	Y	Y		N	Y
129	Leflore, Patricia D.				Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y
130	Lumley, Mark				Y	Y	Y		Y	Y		Y	Y	Y	
131	Maclane, James	Y				Y	Y	Y	Y	N	Y	N	Y		N
132	Majeski, David	N	N	N	N	N	N		N	N	N	N	Y		

4. The District Court nonetheless denied Family Dollar's decertification motion. App. 131a. The court did not address Family Dollar's argument that its individualized exemption defense is incompatible with a collective action. App. 130a. The court also rejected Family Dollar's procedural and constitutional challenges to a collective jury trial. App. 130a–31a. The court stated that "plaintiffs may rely on representative testimony to establish liability and obtain relief," and concluded that "notions of due process and fairness are not offended by a collective trial." *Id.*

Consistent with its opinion allowing the case to proceed as a collective action, the District Court let the Plaintiffs to try their case using representative evidence from witnesses chosen by Plaintiffs' counsel. Doc. 384 ¶9(b); Doc. 533. The court directed the Plaintiffs to anticipate Family Dollar's exemption defense in their case in chief (Doc. 533 ¶2) and limited each side's case to 40 hours of trial time (Doc. 386 Attach.1).

5. The case proceeded to a collective jury trial. App. 21a. In the first trial, the jury deadlocked on the executive exemption. *Id.* During the second trial, the Plaintiffs offered "representative" testimony from a few Plaintiffs handpicked by Plaintiffs' counsel on behalf of all 1,424 Plaintiffs. Only 7 Plaintiffs—all from small, rural stores—testified live in the Plaintiffs' case.

At trial, Family Dollar moved to decertify the collective action and proceed only on the claims of those Plaintiffs who testified. Doc. 559. The district court denied the motion. Doc. 579. The court instructed the jury that not all 1,424 Plaintiffs needed to testify because they were relying on "representative testimony." Doc. 719 at 9. That is, the court instructed the jury to decide Family Dollar's liability to the non-testifying Plaintiffs on an all-or-nothing basis. *Id.* at 9–10.

The jury found that Plaintiffs were not exempt under the FLSA. App. 51a. The district court entered judgment on the jury's verdict and awarded liquidated (or double) damages. App. 122a–23a. After making adjustments for certain Plaintiffs who had filed for bankruptcy, the court entered judgment against Family Dollar for nearly $35.6 million. App. 121a. The final

judgment includes approximately $17 million in overtime backpay and an equal amount of liquidated damages. *Id.*

6. The Eleventh Circuit affirmed the judgment in full. App. 119a. As relevant here, the court affirmed the district court's refusal to decertify the collective action. App. 61a, 69a. The court acknowledged that it had not adopted a precise definition of "similarly situated" under § 216(b), relying instead on an *ad hoc* approach to certification of a collective action. App. 55a–57a & n.38, 59a.

The Eleventh Circuit set out the three factors it considers at the decertification stage: (1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant that are individual to each plaintiff, and (3) fairness and procedural considerations. App 60a. The court then rejected Family Dollar's argument on each factor. App. 61a–69a.

The Eleventh Circuit first addressed Family Dollar's argument that the Plaintiffs' job duties varied widely from store to store. The court rejected Family Dollar's argument based on the company's own decision to classify all its store managers as exempt. App. 63a. The court held that because Family Dollar had "exempted all store managers from overtime pay requirements without regard to store size, sales volume, regions, district, or hiring and firing authority," any evidentiary distinctions among the Plaintiffs were immaterial. App. 63a–64a. In other words, the court used a business decision first made in the 1950s to reject Family Dollar's legal arguments made in the 21st Century.

For the same reason, the Eleventh Circuit rejected Family Dollar's argument that its individualized defenses precluded a collective action. Because "Family Dollar applied the executive exemption across-the-board to every store manager," the court concluded the company could not show the district court erred in "finding that its defenses were not so individually tailored to each Plaintiff as to make this collective action unwarranted or unmanageable." App. 64a–65a. The court failed to acknowledge that the District Court's decision did not mention, much less discuss, the exemption defense as one of Family Dollar's individualized defenses. *See* App. 130a.

On the third factor—fairness and procedural considerations—the Eleventh Circuit rejected Family Dollar's argument that "any collective action would be inherently unfair" given "the size of the class, the individualized application of the exemption defense, and the [District Court's] decision to allow representative testimony at trial." App. 66a. The court acknowledged Family Dollar's argument that "the store's size, sales volume, and location cause store managers' job duties to vary and preclude a collective trial," but concluded that "none of those factors had anything to do with Family Dollar's decision to exempt all store managers from overtime pay." App. 67a n.46

Reasons for Granting the Petition

The Eleventh Circuit's decision warrants this Court's review. The FLSA's executive exemption is both fact-specific and case-specific: It depends on "all the facts in a *particular* case." 29 C.F.R. § 541.700(a) (2006) (emphasis added). The Plaintiffs here include more than 1,400 individuals employed across 40 states, in large stores and small, in rural and urban areas, supervising workforces of varying sizes. Deposition testimony of 255 Plaintiffs showed substantial variations in the job duties that define management under the executive exemption, including the authority to hire, fire, train, interview, appraise, and set work schedules for subordinates. SA-42–64. The Eleventh Circuit nevertheless affirmed the District Court's holding that *each* of the Plaintiffs—more than 99 percent of whom did not even testify at trial—was "similarly situated" to every other Plaintiff. App. 62a.

The Eleventh Circuit's decision in this case conflicts with decisions of numerous other courts holding that litigation over an individualized FLSA exemption is incompatible with the collective-action device. These courts recognize that collective actions should not be certified where individualized inquiries are necessary to resolve application of an FLSA exemption.

If left uncorrected, the Eleventh Circuit's decision could become the *de facto* national rule. Rather than risk filing a collective action in a circuit less hospitable to such claims, employees will now race to file suit in Alabama, Florida, or Georgia on behalf of all employees nationwide. Further percolation will not solve the

problem or result in some better vehicle down the road. Now that the Eleventh Circuit has opened itself up to FLSA collective litigation, there will be little to no further development of the law elsewhere. This Court should step in now to provide the lower courts guidance on the procedural standards necessary to assure that FLSA collective actions are litigated fairly and constitutionally.

A. The Eleventh Circuit's decision conflicts with other courts' decisions that an FLSA collective action is incompatible with an individualized exemption defense.

The FLSA's executive exemption is inherently individualized. The regulations explain that the applicability of this exemption must be decided individually, plaintiff by plaintiff: "Determination of an employee's primary duty must be based on *all the facts in a particular case*." 29 C.F.R. § 541.700(a) (2006) (emphasis added). *See also id.* § 541.103 (2003) ("A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case."). Especially where, as here, a manager performs exempt and nonexempt duties concurrently, the exempt status of that employee must be "determined on a case-by-case basis." *Id.* § 541.106(a) (2006).

Notwithstanding the individualized nature of the exemption defense, the Eleventh Circuit held that 1,424 exemption claims could be litigated collectively in one jury trial. According to the court, "Just because the inquiry is fact-intensive does not preclude a collective

action where plaintiffs share common job traits." App. 64a. The court also concluded that collective action treatment was justified because "Family Dollar applied the executive exemption across-the-board to every store manager." *Id.*

By contrast, other courts hold that claims over an individualized FLSA exemption cannot be maintained in one collective action. These courts hold that the fact-intensive, individualized nature of the exemption analysis fatally undermines the claim that the plaintiffs are "similarly situated." *See Aguirre v. SBC Communications*, 2007 WL 772756, at *14 (S.D. Tex. Mar. 12, 2007) ("In cases with similar variability among the members of the putative class of allegedly misclassified employees, courts have refused to certify the case for collective treatment because an individual inquiry into each plaintiff's job duties is required.") (collecting cases). *Accord Johnson v. Big Lots Stores*, 561 F. Supp. 2d 567, 586–87 (E.D. La. 2008); *Smith v. Heartland Automotive Servs.*, 404 F. Supp. 2d 1144, 1151–54 (D. Minn. 2005); *Reich v. Homier Dist. Co.*, 362 F. Supp. 2d 1009, 1013–14 (N.D. Ind. 2005); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220–21 (D. Conn. 2003); *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498–99 (D.N.J. 2000). *Cf. Bayles v. Am. Med. Response*, 950 F. Supp. 1053, 1065 (D. Colo. 1996) ("It is oxymoronic to use a [collective action] where proof regarding each individual plaintiff is required to show liability.").

In addition, courts have recognized that a collective action over an individualized exemption is neither manageable nor superior to litigating the claims

individually. *See Reyes v. Texas EZPawn*, 2007 WL 101808, at *5–*7 (S.D. Tex. Jan. 8, 2007); *Smith*, 404 F. Supp. 2d at 1154–55; *Lusardi v. Xerox Corp.*, 122 F.R.D. 463, 466–67 (D.N.J. 1988); *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 370–71 (D.N.J. 1987), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988). As the court in *Morisky* observed, litigating an individualized exemption collectively is not efficient because the "exempt or non-exempt status of potentially hundreds of employees would need to be determined on . . . an employee-by-employee basis." 111 F. Supp. 2d at 499, *followed in King v. West Corp.*, 2006 WL 118577, at *14 (D. Neb. Jan. 13, 2006).[2]

Such inconsistency over collective action procedure is untenable. Family Dollar itself has suffered inconsistent results on this very question in two other collective actions. *See Grace v. Family Dollar Stores, Inc.*, 2007 WL 2669699 (W.D.N.C. Sept. 6, 2007), and *Ward v. Family Dollar Stores, Inc.*, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008). The district court in *Grace* and *Ward* refused to certify collective actions covering the identical claims of other store managers. The court held, "A collective action is never appropriate for situations where a court must make an individual determination of each plaintiff's day-to-day activities." *Grace*, 2007 WL 2669699, at *3. "Since each individual manager had

[2] Collective-action treatment is not necessary to assure that wage-and-hour claims are litigated. The FLSA's additional remedies of fee-shifting and liquidated damages (*see* 29 U.S.C. § 216(b)) give each plaintiff incentives to pursue his or her claim individually. *Cf. Castano v. American Tobacco*, 84 F.3d 734, 748 (5th Cir. 1996); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1300 (7th Cir. 1995).

different duties at his or her particular [Family Dollar] store," the court found it "impossible to apply one plaintiff's duties to another." *Id.* The court thus concluded that determining "whether or not the plaintiffs are similarly situated would require a[] fact-specific inquiry into the daily duties of each plaintiff," which "defeats the point of a collective action." *Id.*

This case provides an excellent vehicle for this Court to resolve the disagreement in the lower courts. The deposition testimony taken during discovery revealed the wide disparity among the Plaintiffs both on their managerial job duties and their level of oversight by district managers. See SA-1–88. Had this case arisen in any of the courts that disagree with the Eleventh Circuit's approach, Family Dollar's individualized exemption defense would have resulted in decertification of the collective action. Yet in the Eleventh Circuit, Family Dollar's decision to classify all its store managers as exempt foreordained certification of a collective action by those employees who shared common job traits.

The Court should not tolerate such inconsistent outcomes on such an important procedural issue. The Court should grant certiorari to resolve this conflict.

B. The Eleventh Circuit's decertification ruling will stunt any further circuit-level development of the issue.

The Court should address the issue now. Although the cases on the other side of the split have been decided by district courts, that does not counsel against review here. The courts of appeals have uniformly held that § 216(b) certification and decertification decisions are not appealable on an interlocutory basis. *E.g.*, *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007) ("[C]ourts have uniformly held that they lacked jurisdiction over the appeal, both where the district court has certified and decertified the collective action"); *Comer v. Wal-Mart Stores*, 454 F.3d 544, 548–49 (6th Cir. 2006); *Baldridge v. SBC Communications*, 404 F.3d 930, 931–33 (5th Cir. 2005); *Lusardi v. Lechner*, 855 F.2d 1062, 1065 (3d Cir. 1988). Also, there is no permissive appeal under § 216(b) analogous to that for class actions under Rule 23(f).

Although § 216(b) certification decisions are reviewable on final judgment, neither plaintiffs nor defendants typically press such appeals. If the court denies certification or decertifies a § 216(b) collective action, other plaintiffs can simply file their FLSA claims somewhere else. On the other hand, when the court refuses to decertify a collective action, leaving nothing left to do but try the case collectively before one jury, defendants usually settle. Regardless of how the issue is decided, it rarely results in full review at the circuit level.

Declining to review the Eleventh Circuit's decision in this case will only make a bad situation worse. Legal experts have called FLSA collective actions "the nation's fastest growing legal battlefront between workers and companies." Stephen Franklin, *Workers Long for Overtime/Employers See More Suits Alleging They Failed to Pay for Extra Hours*, HOUS. CHRON. 1, 2006 WLNR 12769557 (July 24, 2006).[3] In 2003, Department of Labor statistics revealed that the number of FLSA collective action filed annually surpassed the number of other employment class actions filed. Brent Hunsberger, *More Wage Cases Land in Court*, PORTLAND OREGONIAN D-1, 2003 WLNR 15802543 (Jan. 1, 2003). As this case demonstrates, a collective action against a nationwide chain can just as easily be filed in Alabama, Florida, or Georgia under § 216(b) on behalf of all managers nationwide.

Left uncorrected, the Eleventh Circuit's decision could likely become the national rule. The Eleventh Circuit is already a hotbed for FLSA collective actions. *See* Mary Shedden, *Overtime Lawsuits A Budding Industry*, TAMPA TRIB. 1, 2007 WLNR 2421731 (Feb. 6, 2007) (dubbing South and Central Florida the "capitals

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[3] *See also* Kris Maher, *Workers Are Filing More Lawsuits Against Employers Over Wages*, WALL ST. J. A2 (June 5, 2006); Kay H. Hodge, *Fair Labor Standards Act and Federal Wage and Hour Issues*, SM097 ALI-ABA 435, 455 (2007) (noting "proliferation of employee collective action lawsuits"); John P. McAdams & Michael A Shafir, *Parent Company Liability Under the Fair Labor Standards Act*, 25 No. 3 TRIAL ADVOC. Q. 16, 20 (2006) ("Collective actions under the FLSA are one of the fastest-growing areas of litigation of any kind").

of this emerging industry").[4] If the Eleventh Circuit's decision stands, it will become their greenhouse.

The Court should also consider the *in terrorem* effect of FLSA collective actions. The possibility of enormous liability awards, based on a complex law that is often difficult to apply, creates enormous pressure for employers to settle. Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 THE LAB. LAWYER 311, 315 (2005). In 2007, the top wage-and-hour collective or class action settlements exceeded $319 million; in 2008, $252 million. Karen Sloan, *Class action workplace litigation hot item in '08*, NAT'L L.J. 12 (Jan. 19, 2009). Those figures do not include Wal-Mart's decision at the end of last year to settle 63 wage-and-hour cases for up to $640 million. Miguel Bustillo, *Wal-Mart to Settle 63 Suits Over Wages*, WALL ST. J. (Dec. 24, 2008).

Continuing uncertainty over how the executive exemption applies to retail store managers forces employers to settle rather than risk their business model on litigation of one collective action on behalf of thousands of employees before one jury. *See* 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL

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[4] This may explain why practically all the circuit-level decisions on § 216(b) have been decided by the Eleventh Circuit. *See Anderson v. Cagle's*, 488 F.3d 945 (11th Cir. 2007); *Cameron-Grant v. Maxim Healthcare Servs.*, 347 F.3d 1240 (11th Cir. 2003); *Hipp v. Liberty Nat'l Life Ins.*, 252 F.3d 1208 (11th Cir. 2001); *Grayson v. Kmart*, 79 F.3d 1086 (11th Cir. 1996); *Haynes v. Singer Co.*, 696 F.2d 884 (11th Cir. 1983); *LaChapelle v. Owens-Ill.*, 513 F.2d 286 (5th Cir. 1975).

3D § 1807, at 503 (2005) (observing "most collective actions settle"). The Department of Labor has recognized that large-scale collective actions take advantage of such legal uncertainty, imposing a "significant cost to the economy." 69 Fed. Reg. 22,122, 22,231.

Employee wages should depend on what the law requires, not confusion over the outcome of high-stakes litigation. Further percolation of this issue will result in little to no further development outside the Eleventh Circuit. The importance of this statutory question to retailers across the country and its economic scope justify the Court's review of the issue in this case.

C. Neither this Court nor the lower courts have established meaningful standards for certification of collective actions under the FLSA.

Congress enacted the FLSA in 1938 as a centerpiece of the New Deal. 52 Stat. 1069 (June 25, 1938). The FLSA's collective-action mechanism allows one employee to sue on behalf of other employees who are "similarly situated." 29 U.S.C. § 216(b). This procedure creates "a unique species of group litigation." 7B WRIGHT, MILLER & KANE, § 1807, at 468. Although the FLSA originally allowed an uninterested representative to sue on behalf of others, Congress removed that provision in the Portal-to-Portal Act of 1947 and instead required interested plaintiffs to affirmatively opt into the litigation. 61 Stat. 84, 87–88. *See* S. Rep. No. 48, at 49 (1947); *Hoffman-LaRoche v. Sperling*, 493 U.S. 165, 173 (1989).

Unlike Rule 23, there are no representative plaintiffs in an FLSA collective action. Instead, an interested employee who wants to become a "party plaintiff" must opt in to the litigation by giving "consent in writing" that is "filed in the court." 29 U.S.C. § 216(b). Each plaintiff "has the right to be present in court to advance his or her own claim." 7B WRIGHT, MILLER & KANE § 1807, at 475. Also, the *res judicata* effect of the judgment in an FLSA collective action is more limited. A § 216(b) collective member "must opt in to be bound," while a Rule 23(b)(3) class member "must opt out not to be bound." *Woods v. New York Life Ins.*, 686 F.2d 578, 580 (7th Cir. 1982).

The FLSA does not define "similarly situated," nor does it spell out the procedure for certifying a § 216(b) collective action. This Court hasn't done so, either. The Court's only decision addressing § 216(b) is *Hoffman-La Roche v. Sperling*, which authorized district courts to facilitate notice to potential opt-in plaintiffs. 493 U.S. at 169. In *Hoffman-La Roche*, the Court recognized that FLSA collective actions present "opportunities for abuse" and discussed the federal courts' "duty and broad authority to exercise control" over such actions. *Id.* at 171 (internal quotation omitted). Having authorized federal courts to "midwif[e]" these actions (*id.* at 176 (Scalia, J., dissenting)), the Court has not taken the next step to decide what procedural standards should govern certification or decertification of § 216(b) collective actions.

Without any appellate guidance, the leading approach to certifying collective actions is an *ad hoc*

analysis developed by district courts.[5] *See Lusardi*, 118 F.R.D. at 358–59. The most remarkable feature of the *ad hoc* approach is its failure to define "similarly situated," the statutory basis for the procedure. *See Mooney v. Aramco Servs.*, 54 F.3d 1207, 1213 (5th Cir. 1995) (discussing *Lusardi* and its progeny), *overruled on other grounds by Desert Palace v. Costa*, 539 U.S. 90 (2003). All of the circuits to address the issue—including the Eleventh Circuit here—have either avoided the definitional issue or adopted the *ad hoc* approach. *See Mooney*, 54 F.3d at 1216 (avoiding decision); App. 55a–56a & n.38 (adopting *ad hoc* approach); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1102–05 (10th Cir. 2001) (discussing possible approaches and adopting *ad hoc*). As a result, the FLSA's powerful statutory mechanism allowing for nationwide collective actions is limited only by a particular judge's interpretation of the term "similarly situated." This

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[5] The minority approach, which applies the standards of Rule 23 to FLSA collective actions, was first developed in *Shushan v. Univ. of Colo.*, 132 F.R.D. 263 (D. Colo. 1990). The court in *Shushan* concluded that without Rule 23, § 216(b) procedures would be "practically formless":

> [I]t does not seem sensible to reason that, because Congress has effectively directed the courts to alter their usual course and not be guided by rule 23's 'opt-out' feature in a [§ 216(b)] class action, it has also directed them to discard the compass of rule 23 entirely and navigate the murky waters of such action by the stars or whatever other instruments they may fashion.

Id. at 266.

Court's clarification of this important procedural area is long overdue.

This case illustrates the problems caused by a failure to define "similarly situated" in the context of an FLSA collective action. This case is about whether each Family Dollar store managers is an exempt executive employee. The primary factual question under the exemption is whether the Plaintiffs' primary duty is "management." 29 C.F.R. § 541.100(a)(2) (2006); 29 C.F.R. § 541.1(a) (2003). Family Dollar conducted discovery to determine whether the Plaintiffs exercised the job duties that the FLSA regulations use to define "management." *See* 29 C.F.R. § 541.102 (2006); 29 C.F.R. § 541.102(a) (2003). It found significant dissimilarity among the Plaintiffs on those job duties.

Tabulating the managerial duties of just the 255 Plaintiffs whom Family Dollar was allowed to depose revealed widespread dissimilarity. On the authority to hire employees, for example, 54 percent of those Plaintiffs testified that they had such authority, while 46 percent testified that they did not. SA-64. When asked whether they had authority to fire employees, 33 percent said yes, and 67 percent said no. *Id.* When asked whether they had authority to discipline, 73 percent said yes, and 27 percent said no. *Id.* Similarly, 71 percent said they had responsibility for appraising or reviewing their employees' job performance, and 29 percent said they did not. *Id.* More than three-quarters of the deposed Plaintiffs admitted that they planned the work of their employees. When asked this question in their depositions, 78 percent answered yes,

while 22 percent answered no. *Id.* Such disparate testimony showed that the Plaintiffs were not similarly situated.[6]

Without a defined standard to govern how "similarly situated" employees must be, however, the Plaintiffs were able to circumvent Family Dollar's proof of dissimilarity by arguing similarity of a different—and altogether irrelevant—kind. Nothing in the FLSA or its regulations requires that an exempt manager must exercise "sole" or "independent" authority to hire, fire, discipline, or promote employees without any oversight. Nonetheless, the Plaintiffs used such a standard to paper over the differences shown by Family Dollar's chart with a chart showing that no deponent exercised such "sole authority." Doc. 295 Exs.B & P; Doc. 296 Porter Aff.; Doc. 298 at 2–3 & n.1. The District Court adopted this rationale and found the Plaintiffs similarly situated because they all "lack *independent authority* to hire, promote, discipline, or terminate *assistant managers*." App. 128a (citing Pls.' Exs.B & P) (emphasis added). Applying that standard is like finding

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[6] The Eleventh Circuit disregarded the deposition testimony on the ground that Family Dollar's chart "fail[s] to paint a full picture." App. 65a n.44. The court quibbled with whether certain boxes on the chart were appropriately checked based on one Plaintiff's deposition, but it did not find that the evidence was inaccurate. *Id.* Nor did it dispute that different Plaintiffs gave varying deposition testimony on the range of duties used to define "management." *Id.* The charts themselves refute the court's comment that they failed to address "aspects of store manager's day-to-day duties" other than the authority "to hire, fire, interview, train, and discipline other employees" (*id.*). *See* SA-42–64.

all Plaintiffs similarly situated because none of them has flown to the moon. While that may be true, it is legally irrelevant to what the FLSA and its regulations require.

The Eleventh Circuit did not apply a more meaningful standard of similarity. As it has in past decisions, the Eleventh Circuit refused to adopt a precise definition of what "similarly situated" means under § 216(b). App. 55a–56a & n.38, 59a. Instead, the court agreed with the Plaintiffs' argument that none of the factual differences among the Plaintiffs mattered because Family Dollar had decided to classify its store managers as exempt across the board. App. 63a, 64a, 66a, 67a n.46.

The court did not explain how a business decision made decades ago—classifying a job as exempt—could overcome current evidentiary dissimilarity among the Plaintiffs on that exemption or the individualized analysis necessary to apply the exemption or the unfairness of litigating 1,424 individualized claims before one jury. As a practical matter, businesses do not make exemption classification decisions employee by employee. But if an individual employee challenges his or her classification, the FLSA requires that decision to be made plaintiff by plaintiff, based on all the facts in a "particular case." 29 C.F.R. § 541.700(a) (2006). Just because Family Dollar classified its store managers as exempt for purposes of its business model does not mean that all of the employees who hold that job are "similarly situated" for purposes of collective-action litigation. *See Holt v. Rite Aid*, 333 F. Supp. 2d 1265, 1270–72 (M.D. Ala. 2004); *Mike*, 274 F. Supp. 2d at 220–21; *Morisky*, 111 F. Supp.

2d at 498–99. Yet the Eleventh Circuit relied on that business decision both to find the Plaintiffs similarly situated and to reject Family Dollar's procedural objections.

When application of the term "similarly situated" is this lax, it risks violating due process. Forcing Family Dollar to litigate its liability for overtime to 1,424 different employees in a collective trial before one jury raises "serious questions . . . concerning the fairness, manageability, and meaningfulness" of a collective action. *Lusardi*, 118 F.R.D. at 370–71. *See also Johnson*, 561 F. Supp. 2d at 587 ("observing "efficiency gains" from a collective action "cannot come at the expense of a defendant's ability to prove a statutory defense without raising serious concerns about due process"). The procedure used here left Family Dollar's liability to be determined all or nothing based on a handful of witnesses whose testimony was not representative of the whole. If due process would not allow such a judgment to stand in a class action (*Hansberry v. Lee*, 311 U.S. 32, 41–45 (1940)), it should not apply any differently to a § 216(b) collective action.

This Court should consider these due process ramifications in deciding the proper operation of § 216(b)'s collective-action procedure. Section 216(b) has been in place for over 70 years, and employees are invoking more often—and more powerfully—now than ever before. Guidance from this Court on the procedural standards for certifying § 216(b) collective actions is overdue. In the class-action context, this Court's recent decisions have dramatically clarified how Rule 23(b) class actions operate. *See Ortiz v. Firbreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*,

521 U.S. 591 (1997). The Court should intervene to provide similar guidance concerning the procedural standards that should govern § 216(b) class actions.

D. This is a recurring issue of national importance that affects both the procedure and the substance of FLSA litigation.

This case also raises a recurring issue of national importance. According to the Department of Labor, the FLSA's overtime provisions cover approximately 114 million workers. 69 Fed. Reg. 22,122, 22,197 & Chart 1. The wages of more than 64 million employees are affected by the FLSA's executive, administrative, and professional exemptions. *Id.* at 22,201 & Chart 3. More than 20 million employees work in the retail industry alone. *Id.* at 22,220 & Table 5.1. Employees file thousands of lawsuits under the FLSA each year, a number that is growing exponentially. Federal court statistics show the number of FLSA actions filed annually has nearly quadrupled since 2003. Administrative Office of the Federal Courts, *2007 Annual Report of the Director* 150 (Table C-2A) (2,751 cases in 2003; 7,310 cases in 2007). Between 2006 and 2007 alone, annual FLSA case filings saw a 73.8 percent increase. *Id.* (from 4,207 in 2006 to 7,310 in 2007).

Under the FLSA, collective action procedure has a significant impact on the outcome of litigation. The Eleventh Circuit's decision creates an all-or-nothing approach to high stakes litigation. Once a collective action on behalf of thousands of employees proceeds past decertification to trial, the wage claims of all the members of the collective will succeed or fail based upon

the testimony of a small fraction of plaintiffs. That is especially true if, as here, the court instructs the jury to decide the claims of the non-testifying plaintiffs based on the claims of the "representative plaintiffs who did testify." Doc. 719 at 10. The unfairness in this approach is sure; the only question is on which side of the *v.* it will fall. As the court in *Johnson v. Big Lots* recently observed, a collective verdict for the plaintiff would necessarily rest on less-than-representative proof and would impose liability to many employees who would be found exempt as a matter of law in individual litigation. 561 F. Supp. 2d at 588. On the other hand, a collective verdict for the defendant would extinguish all the plaintiffs' claims, even those who were obviously misclassified and could never be found exempt on an individual basis. *Id.*

This case epitomizes this inevitable unfairness. Within the 1,424 Plaintiffs in this case, there are some who were likely misclassified. In fact, the District Court granted judgment on behalf of 163 Plaintiffs whom payroll records showed did not supervise two or more full-time employees as a matter of law. *See* App. 89a. Yet had the verdict been in favor of Family Dollar, any misclassified employees would have lost their claims in the collective process.

On the other hand, the 1,424 Plaintiffs certainly included some who were exempt as a matter of law. In fact, two store managers who received notice in this case but filed suit in another district were held to be exempt on summary judgment. *See Fripp v. Family Dollar Stores*, No. 2:03-721-18BG (D.S.C. Sept. 27, 2004); *Davis v. Family Dollar Stores*, No. 3:03-170-22BC (D.S.C.

Sept. 28, 2004). Several other Plaintiffs—like Krista Allen discussed at p.9, above—provided deposition testimony that would have entitled Family Dollar to summary judgment had their claims been filed individually, not collectively. In fact, had Family Dollar been sued by the Plaintiffs individually in their home districts, it would have won more cases on summary judgment than it lost, given the law in the other circuits holding retail managers exempt as a matter of law. *See Donovan v. Burger King*, 672 F.2d 221, 225–27 (1st Cir. 1982); *Donovan v. Burger King*, 675 F.2d 516, 520–22 (2d Cir. 1982); *Jones v. Virginia Oil*, 69 Fed. Appx. 633, 637–39 (4th Cir. 2003); *Thomas v. Speedway SuperAmerica*, 506 F.3d 496, 502–09 (6th Cir. 2007); *Murray v. Stuckey's*, 939 F.2d 614, 618 (8th Cir. 1991) (holding FLSA entitles employer to "one designated exempt executive" at each freestanding store); *Murray v. Stuckey's*, 50 F.3d 564, 569–70 (8th Cir. 1995) (same); *Baldwin v. Trailer Inns*, 266 F.3d 1104, 1114–16 (9th Cir. 2001).

It is only because this case proceeded to trial as a collective action that Family Dollar is now liable for overtime and liquidated damages to all 1,424 Plaintiffs. This $35 million judgment against Family Dollar shows how § 216(b)'s procedure, if left unchecked, can have devastating substantive consequences.

Conclusion

For these reasons, the Court should grant the petition.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED DECEMBER 16, 2008

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 07-12398

D.C. Docket No. 01-00303-CV-UWC-W

JANICE MORGAN, BARBARA RICHARDSON,
on behalf of themselves and all others
similarly situated, et al.,

Plaintiffs-Appellees,

versus

FAMILY DOLLAR STORES, INC.,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama

(December 16, 2008)
(As Amended Dec. 22, 2008)

Before DUBINA, HULL and FAY, Circuit Judges.

Appendix A

HULL, Circuit Judge:

The Court *sua sponte* issues this corrected opinion. An opt-in class of 1,424 store managers, in a collective action certified by the district court, sued Family Dollar Stores, Inc. ("Family Dollar") for unpaid overtime wages under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201-219. During an eight-day trial, the Plaintiffs used Family Dollar's payroll records to establish that 1,424 store managers routinely worked 60 to 70 hours a week and to quantify the overtime wages owed to each Plaintiff. Family Dollar focused on its affirmative defense that the store managers were executives within the meaning of the FLSA and exempt from its overtime pay requirements.

The jury found that the Plaintiff store managers were not exempt executives and that Family Dollar had willfully denied them overtime pay. The jury awarded $19,092,003.39 in overtime wages. The court entered a final judgment of $35,576,059.48 against Family Dollar consisting of $17,788,029.74 in overtime wages and an equal amount in liquidated damages.

Because of the complex procedural history from 2001 to 2005 that led to the case being certified as a collective action, the subsequent eight-day trial in 2006, and Family Dollar's myriad challenges on appeal, we preface the opinion with a table of contents:

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Appendix A

I. PROCEDURAL HISTORY FROM 2001-2005

A. Complaint

Family Dollar is a nationwide retailer that operates over 6,000 discount stores that sell a wide assortment of products, including groceries, clothing, household items, automotive supplies, general merchandise, and seasonal goods.[1] In January 2001, Janice Morgan and Barbara Richardson, two store managers, filed a Complaint on behalf of themselves "and all other similarly situated persons," alleging that Family Dollar willfully violated the FLSA by refusing to pay its store managers overtime compensation.

The first Complaint asserted that Family Dollar paid store managers a salary, required them to work 60 to 90 hours a week, and refused to compensate them for overtime. According to Plaintiffs, store managers are managers only in name and actually spend the vast majority of their time performing manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Store managers spend only five to 10 hours of their time managing anything. Plaintiffs sought

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1. Family Dollar opens around 500 stores a year. Family Dollar had 2,900 stores in 1999, 4,545 stores in 2003, 5,700 stores in 2005, and has over 6,000 stores now. Here, we recite the remaining facts in this case based on Family Dollar's organization during the time frame relevant to this case, which is 1999 to 2005.

unpaid benefits, overtime compensation, and liquidated damages due to Family Dollar's willful FLSA violations.

The Complaint urged the district court to issue notice of the action to all similarly situated Family Dollar employees nationwide, and to inform them of their right to opt into the suit as a collective action. Plaintiffs relied on 29 U.S.C. § 216(b), which authorizes courts to maintain a case as one collective action so long as the employee-plaintiffs are similarly situated.

Family Dollar's Answer raised a number of affirmative defenses. It asserted that its store managers were exempt executives[2] and denied any violations were willful. Family Dollar also argued that a collective action, under § 216(b), was impermissible because (1) the store managers were not similarly situated, (2) Plaintiffs' claims were not representative of others in the group, and (3) Plaintiffs could not satisfy § 216(b)'s requirements for maintaining a collective action.

In May 2001, Plaintiffs filed their Third Amended Complaint on behalf of Morgan and Richardson, and added Cora Cannon and Laurie Trout-Wilson as Plaintiffs. The Third Amended Complaint raised the same claims for overtime pay and, again, urged the district court to notify other similarly situated store managers of the action.

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2. The FLSA provides that its protections "shall not apply with respect to . . . any employee employed in a bona fide executive . . . capacity." 29 U.S.C. § 213(a)(1).

B. April 2001 Motion to Facilitate Nationwide Notice

In April 2001, Plaintiffs moved the district court to (1) certify the case as a collective action, (2) authorize notice "by first class mail to all similarly situated management employees employed by Family Dollar Stores, Inc. at any time during the three years prior to the filing of this action to inform them of the nature of the action and their right to opt-into this lawsuit," and (3) order Family Dollar to "produce a computer-readable data file containing the names, addresses, Social Security number and telephone numbers of such potential opt-ins so that notice may be implemented." In May 2001, the court denied the motion for immediate notice, but indicated the motion was "overruled without prejudice."

In September 2001, the district court issued a scheduling order pursuant to Rule 16(b).[3] The order indicated that the parties mutually agreed to "an initial period of discovery limited to identification of claims and their factual basis," and that, despite Family Dollar's opposition, Plaintiffs would request the court to facilitate notice on or before February 2002. Discovery was to expire on October 1, 2002.

3. In this opinion, our reference to a "Rule," unless otherwise stated, is to the Federal Rules of Civil Procedure.

C. October 2001-Second Motion to Facilitate Nationwide Notice

In October 2001, Plaintiffs renewed their motion to facilitate notice. Family Dollar twice opposed Plaintiffs' motion and urged the district court to delay ruling to allow more discovery. At oral argument in April 2002, the court withheld ruling pending additional discovery by Family Dollar, and ordered Plaintiffs' counsel to make all named Plaintiffs available for deposition. In April 2002, before the court ruled on the renewed motion, the parties jointly agreed to send limited notice of the suit to current and former store managers that worked in the regions where the named Plaintiffs worked from July 1, 1999 to the present. As a result, the court denied Plaintiffs' October 2001 motion as moot.

D. July 2002 Notice

In July 2002, the parties notified 784 potential class members in Region 4 (which contains 15 Family Dollar districts in Alabama, Mississippi, Louisiana, Georgia, and Tennessee), district 39 (in Georgia), and district 118 (in New York). The jointly-sent notices required the recipients to mail their consent forms by October 22, 2002. In August 2002, the court extended the discovery deadline by 120 days.

By October 2002, 142 store managers from different states had filed consent forms. Plaintiffs' counsel subsequently sent each of those store managers an 11-page questionnaire with 17 questions and 75 total

subparts. The questionnaire asked about employment dates, weekly work hours, day-to-day duties, amount of hours spent on manual labor, what independent authority store managers had, whether district managers made all important managerial decisions, whether hourly assistant managers performed the same duties, and a host of other questions relating to Family Dollar store operations.

E. October 2002—Third Motion to Facilitate Nationwide Notice

In October 2002, Plaintiffs renewed their motion to facilitate nationwide notice. Plaintiffs' motion estimated that approximately 11,164 current or former store managers had no notice of the action and that, based on the approximately 20% response rate, a sizeable number of potential class members would opt into the suit. Plaintiffs' motion and counsel's affidavit summarized the responses to the 11-page questionnaire. Plaintiffs argued that the opt-ins' responses showed that the store managers were similarly situated and that there were enough initial responses to warrant nationwide notice.

Plaintiffs also offered the Rule 30(b)(6) deposition testimony of Bruce Barkus, the Executive Vice President of Store Operations at Family Dollar. Barkus admitted that the store manager job description is the "current and only job description[ ] for Family Dollar Store Managers," and acknowledged that Family Dollar made no inquiry into how many hours a week store managers actually work or whether store managers'

actual day-to-day duties mirror the ones outlined in the job description. Plaintiffs argued that Barkus's testimony bolstered the questionnaire responses that showed store managers spent 90% of their time on manual tasks.

F. November 2002 Order and Fact Findings

In November 2002, the district court, acting pursuant to § 216(b), granted Plaintiffs' motion to facilitate nationwide class notice to "all former and current Store Managers who work and/or worked for the Defendant over the last three years." The court found Family Dollar's store managers were similarly situated within the meaning of § 216(b) because they: (1) worked 60 to 80 hours a week; (2) received a fixed salary and no overtime pay; (3) spent 75 to 90% of their time on non-managerial tasks such as stocking shelves, running the cash registers, unloading trucks, and performing janitorial duties; (4) did not consistently supervise two or more employees; (5) lacked the authority to hire, discipline, or terminate employees without first obtaining permission from their district managers; (6) could not select outside vendors without their district managers' permission; (7) worked no less than 48 hours a week under the threat of pay cuts or loss of leave time; and (8) arrived at work before the store opened and stayed until after closing.

Although the district court acknowledged that there existed "some differences between the named-Plaintiffs and the opt-ins in terms of pay scale and job duties,"

it concluded that "these differences do not preclude the facilitation of nationwide service." The court stressed that Plaintiffs must only be "similarly situated"—not "identically situated." The court considered Family Dollar's contention that its stores have "different locations, are of various sizes, and sell different volumes of merchandise." But the court found that those differences did not undermine the factual basis for concluding that Family Dollar's store managers were similarly situated. The court emphasized that it had the benefit of making its decision after twenty months of litigation, considering Plaintiffs' motion to facilitate nationwide notice on two previous occasions, and giving Family Dollar an opportunity to depose the named Plaintiffs. The court found that a sufficient number of similarly situated employees likely were interested in joining the suit and that the case could be managed and resolved in a single litigation.

G. December 2002 Notice to Potential Opt-Ins

In December 2002, Plaintiffs' counsel mailed 12,145 notices nationwide to current and former Family Dollar store managers employed on or after July 1, 1999. Each had until February 25, 2003 to return the enclosed consent forms. Each mailing included the 11-page questionnaire. By March 2003, nearly 2,500 current and former Family Dollar store managers had joined the litigation.

H. Discovery Disputes

Throughout the litigation, the district court resolved scores of discovery-related motions. For example, Plaintiffs refused to turn over certain questionnaire responses based on attorney-client privilege. This triggered various motions to compel. In another instance, Family Dollar refused to provide Plaintiffs with information related to the identity of its district managers. Plaintiffs responded with their own motions to compel. Meanwhile, a fight over depositions was brewing. In March 2003, Family Dollar notified Plaintiffs of its intent to depose, either in person or by written questions, all opt-in Plaintiffs.

The court extended discovery until August 29, 2003. And in June 2003, in a comprehensive order, the court (1) required Plaintiffs' counsel to produce the questionnaire responses used to support Plaintiffs' motion to facilitate nationwide notice; (2) ordered Family Dollar to produce the names, addresses, and telephone numbers of all former Family Dollar district managers since June 1999; (3) prohibited Plaintiffs' counsel from engaging in *ex parte* communication with former Family Dollar district managers; and (4) clarified that "this Court shall . . . treat each opt-in Plaintiff as a separate party for purposes of enforcement of the Scheduling Order."

Discovery issues continued to surface. The court again extended deadlines for discovery to December 12, 2003, and for dispositive motions to January 12, 2004.

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In October 2003, Family Dollar informed Plaintiffs that it intended to depose all remaining opt-in Plaintiffs, using written questions, pursuant to Rule 31. In November 2003, Family Dollar's counsel sent a letter stating it planned to take 2,100 depositions in seven days, using 338 written questions per deponent, from December 6 to 12, 2003, in Birmingham.

Plaintiffs moved for protective orders to limit the number of depositions to two a day until the end of discovery and to prevent Family Dollar from deposing the nearly 2,100 opt-in Plaintiffs. Plaintiffs' motion noted that discovery had been ongoing for two and a half years, and that prior to October 2003, Family Dollar failed to depose any of the opt-in Plaintiffs. Plaintiffs objected to Family Dollar's attempt to depose 2,100 opt-in Plaintiffs during the last 29 days of discovery as burdensome, unreasonable, and expensive. In November 2003, Family Dollar moved for a protective order, prohibiting disclosure of the written deposition questions to the opt-in Plaintiffs.

In January 2004, the district court issued a discovery management order resolving many issues. The court limited Family Dollar to "not more than" 250 depositions of the opt-in Plaintiffs, "including those who [had] already been deposed." The court did not restrict Family Dollar to written questions, but limited depositions to five per day (each three hours long). The order authorized Plaintiffs to select 250 opt-ins for Family Dollar to depose in-person. The court pushed the discovery deadline back to April 12, 2004, with

dispositive motions due May 12, 2004. It denied both parties' motions for protective orders as moot.

In late January 2004, Family Dollar moved to clarify or alter the discovery management order. In early February 2004, the district court denied Family Dollar's request to depose the rest of the opt-in Plaintiffs under Rule 31 (written deposition questions), but granted Family Dollar leave to use Rule 33 (interrogatories) to obtain discovery from the remaining opt-in Plaintiffs. In March 2004, the court issued an order clarifying that Family Dollar was entitled to serve 25 interrogatories on every opt-in Plaintiff.

By mid-February 2004, 152 opt-in Plaintiffs (of the 250) had not been deposed in-person. The court gave Plaintiffs' counsel seven days to provide Family Dollar with a list of the remaining 152 opt-in Plaintiffs and the dates that each would be available for deposition in Birmingham. To ensure Family Dollar had an opportunity to depose the remaining 152 opt-in Plaintiffs in Birmingham, the district court, in late February 2004, also ordered Plaintiffs' counsel to provide Family Dollar with three days notice of any change in scheduled depositions, and threatened to dismiss opt-in Plaintiffs who failed to attend. For the next several months, the court dismissed with prejudice various opt-in Plaintiffs for their failure to appear at depositions in Birmingham.

By the end of discovery, Family Dollar deposed, in person, 250 opt-in Plaintiffs and the named Plaintiffs.[4]

In addition to the 250 depositions of the opt-in Plaintiffs, the parties deposed Family Dollar's executives, district managers, various experts, and other witnesses. Family Dollar produced voluminous payroll records, store manuals, emails, and other communications. Plaintiffs produced the individual responses to the questionnaire. The record was fully developed before the next critical step in this case.

I. May 2004 Motion to Decertify the Collective Action

In May 2004, Family Dollar moved to decertify the collective action under § 216(b). Relying on affidavits and a wealth of information revealed during discovery, the parties briefed whether the case should proceed as 1,424 individual actions[5] or as a § 216(b) collective action. Family Dollar argued (1) the opt-in Plaintiffs were not

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4. Although the court permitted Family Dollar to send interrogatories to the remaining opt-in Plaintiffs, it does not appear Family Dollar did so (at least from the record before us).

5. The total number of opt-ins began at around 2,500 but was reduced over time to 2,100 and ultimately decreased to 1,424 based on numerous events, such as failure to appear for depositions, bankruptcy filings, and other district court rulings. We use 1,424 because that is the number of Plaintiffs left when the case was tried.

similarly situated under the FLSA, because their day-to-day job duties were too different; (2) the executive exemption defense is inherently individualized; and (3) discrepancies in the store managers' duties made a collective trial impossible and unfair.

In response, Plaintiffs pointed out that discovery established that all store managers were similarly situated because they (1) have the same job description, (2) spend 75 to 90% of their time on the same non-management duties, and (3) spend little time on the management duties in their job description. In addition to Barkus's testimony, Plaintiffs emphasized the deposition testimony of two other Family Dollar executives, Bill Broome and Dennis Heskett, indicating that Family Dollar applied the overtime exemption across the board without any consideration of store-by-store variables, and that store size and location did not affect Family Dollar's decision to exempt all store managers from overtime pay requirements.[6]

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6. Broome testified:

> Q. Now, Family Dollar has not done a study about the duties of store managers in relation to whether they should be exempt or non-exempt for overtime purposes, has it?
>
> A. Not that—I don't know, not that I'm aware of.
>
> Q. You're the official company spokesman, as you told us; correct? Now, Family Dollar has simply said all the store managers are exempt, every one of them; right?

(Cont'd)

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(Cont'd)

A. Yes, Sir.

. . .

Q. You said every store's manager is considered exempt. And when you said "every," you meant regardless of store size, number of employees, whether it's rural or urban, no matter what its profits, no matter what anything; you just said they're all exempt, didn't you?

A. All of our store managers are salaried, yes, sir, in every store.

Q. Doesn't matter how many employees are in the store, they're all just exempt?

A. All the stores of Family Dollar, yes, sir.

Heskett testified:

Q. Does a store's location, whether it's rural or urban affect whether a store manager is exempt from overtime?

A. Not than I'm aware of.

Q. Does the store's size affect whether a store manager is exempt from overtime?

A. Not than I'm aware of.

. . .

Q. Does staff size, the number of employees supervised, does that affect whether the store manager gets paid overtime?

A. Not than I'm aware of.

(Cont'd)

J. January 2005 Order and Fact Findings

In a January 2005 order, the district court denied Family Dollar's motion to decertify, determined that none of the factual findings in its November 2002 order had been called into question, and made additional fact-findings. The court's order also expressly incorporated those 2002 findings by reference.

In addition, the court found that the "evidence confirm[ed] that substantial similarities exist in the job duties of the named and opt-in Plaintiffs." The court found that 90% of the named and opt-in Plaintiffs (1) interview and train employees, (2) direct work of employees, and (3) maintain production and sales records.

The court also found that the named and opt-in Plaintiffs had similar restrictions on the scope of their responsibilities. Although classified as store managers, they lacked independent authority to hire, promote,

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(Cont'd)

> Q. Do you know anything about stores that varies from store to store that affects whether the store managers get paid overtime?
>
> A. None that I can think of.
>
> Q. In fact the company has made a determination that all store managers for all stores will not get paid overtime at overtime rates, hasn't it?
>
> A. Our managers are salaried and have been as far as I know for a long time.

discipline, or terminate assistant managers; award employees pay raises; or change weekly schedules of hourly employees. And 90% lacked the power to close the store in an emergency without the district manager's permission. The court concluded that none of the named and opt-in Plaintiffs were responsible for the "total operation of their stores," and that, in reality, district managers performed the relevant managerial duties. The court found:

> [m]uch of the management discretion which would ordinarily be exercised by store managers is exercised by the district management pursuant to corporate policies and practices set at headquarters. The store managers are very closely supervised by the district managers. In terms of managerial duties, the district manager is more directly responsible for the operation of a Family Dollar store than the store manager.

The court also determined that Plaintiffs similarly spent their time between managerial and non-managerial duties. It found that most (90%) of the named and opt-in Plaintiffs (1) "spend only a small fraction of their time performing managerial duties"; (2) "spend the vast majority of their time on essentially non-managerial duties such as unloading trucks, stocking shelves, working as cashiers, and performing janitorial duties"; and (3) shared some of their managerial duties with nonexempt, hourly employees (ordering merchandise, controlling store keys, opening and closing the store,

depositing money in banks, and approving checks, refunds, and returns).

Viewing the evidence "as a whole," the court found that (1) the primary duties of Plaintiffs were not managerial; (2) the time spent performing non-managerial duties did not significantly differ from store to store, district to district, or region to region; and (3) the relative importance of the non-managerial duties (as compared to the limited number of managerial duties) did not vary significantly depending on the store or district. Further, "the basic pay rates of the named and opt-in Plaintiffs are also similar," in that Family Dollar paid "all of its store managers a base salary regardless of the weekly hours they work." The court determined that Family Dollar's defenses were not so individually tailored to each Plaintiff that a collective action would be unmanageable. Because substantial similarities existed in the Plaintiffs' job duties, and the same policies and procedures applied to each store, the court concluded that the case could be fairly tried as a collective action.[7]

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7. In May 2004, the court denied Family Dollar's motions for summary judgment, which were based on the statute of limitations, the executive exemption defense, and judicial estoppel. Family Dollar filed a number of motions for reconsideration, and in July 2004, the court granted Family Dollar summary judgment on the two-year statute of limitations as to 54 Plaintiffs and on the three-year statute of limitations as to eight Plaintiffs. This appeal does not involve those rulings.

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K. First Jury Trial

In February 2005, the court entered a pretrial order summarizing each party's trial position. Family Dollar did not contest that it engaged in interstate commerce or that it failed to pay its store managers time and a half for any work over 40 hours a week. Its success at trial would turn on whether Family Dollar proved its store managers were exempt executives.

Before the first jury trial, the court allowed the Plaintiffs to represent the opt-in members as a whole. Family Dollar argued that Plaintiffs were not similarly situated, repeatedly sought decertification, and alternatively argued the Plaintiffs should be divided into nine subgroups. The court denied Family Dollar's requests and allowed the case to be tried as a collective action with the Plaintiffs representing (and thus binding for good or bad) the opt-in members as a whole. In the first trial, the jury deadlocked. Therefore, the issues on appeal arise out of the second trial.

II. SECOND JURY TRIAL IN 2006

The second jury trial lasted eight days. This time the jury reached a verdict, expressly finding the store managers were not exempt. The parties called 39 witnesses—store managers, district managers, corporate executives, payroll officials, and expert witnesses. In total, the testifying store managers worked at 50 different Family Dollar stores. The testifying district managers ran the operations of 134 different

stores. Two testifying Family Dollar executives oversaw 1,400 stores, while a third testifying executive was in charge of all stores.

The parties presented hundreds of Family Dollar's records detailing its policies and procedures. These records included Family Dollar's Store Policy Manual, subsequent manual revisions, four volumes of the Professional Development Training Reference Book, the Personnel Training Manual, various Frequently Asked Question documents, "Weekly Work Schedules," and emails by district managers to store managers. The parties also introduced a large volume of payroll records showing (1) the number of hours worked by each Plaintiff store manager each week, (2) each store manager's salary and rate of pay, and (3) the number of hours every employee worked each week. Both parties submitted multiple exhibits summarizing payroll data in easy-to-digest charts.

Given the jury's verdict and our standard of review, we outline the trial evidence in the light most favorable to the Plaintiffs.[8]

8. Family Dollar repeatedly moved for judgment as a matter of law, including at the close of the evidence and after the jury's verdict. We review a district court's denial of a motion for judgment as a matter of law *de novo*. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1275 (11th Cir. 2008); *Millennium Partners, L.P. v. Colmar Storage, LLC*, 494 F.3d 1293, 1299-1300 (11th Cir. 2007). "The question before the district court regarding a motion for judgment as a matter of law (Cont'd)

Appendix A

A. Corporate Structure

Family Dollar is a publicly held, nationwide retailer that operates over 6,000 discount stores in 40 states and the District of Columbia. It has annual sales of around $5 billion and annual net profits ranging from $200 to 263 million from 1999 to 2005. Its individual stores have average annual sales of $1 million, and average net profits of 5 to 7%, or $50,000 to $70,000.

Family Dollar structures store operations into five divisions (each headed by a vice-president), 22 regions (each headed by a regional vice-president), and 380 districts (each overseen by a district manager). Each district contains multiple stores. Each district manager

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remains whether the evidence is 'legally sufficient to find for the party on that issue,' Fed. R. Civ. P. 50(a)(1), regardless of whether the district court's analysis is undertaken before or after submitting the case to the jury." *Chaney v. City of Orlando*, 483 F.3d 1221, 1227 (11th Cir. 2007). " 'In considering the sufficiency of the evidence that supports the jury's verdict, we review the evidence in the light most favorable to, and with all reasonable inferences in favor of, the nonmoving party.' If reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions based on the evidence presented, the motion should be denied." *Millennium Partners, L.P.*, 494 F.3d at 1299-1300 (quoting *Montgomery v. Noga*, 168 F.3d 1282, 1289 (11th Cir. 1999)). "We will reverse only if the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict." *Goldsmith*, 513 F.3d at 1275 (internal quotation marks omitted).

supervises the operations of 10 to 30 stores. Some districts are small with multiple stores in an urban area. Other districts are larger with small stores in small towns. The district manager's office is housed within one store in the district.

Family Dollar's corporate office issues instruction manuals with operating policies that apply uniformly to all stores nationwide. No matter the size of the store or the district, every detail of how the store is run is fixed and mandated through Family Dollar's comprehensive manuals.

B. Store Managers

Family Dollar has the same job description for all store managers and lists their "Essential Job Functions" as:

> 1. Supervise all store personnel, including assigning tasks, ensuring compliance with merchandising and operational policies, and locking and unlocking store.
>
> 2. Prepare, complete and transmit store reports as required.
>
> 3. Count money/checks, prepare bank deposits and travel to bank.
>
> 4. Count petty cash, get change from bank, unlock petty cash drawer and give change to cashiers as needed in registers.

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5. Post net sales in Beat Yesterday Book.

6. Train Cashiers and Stock Clerks through verbal instructions and non-verbal demonstration.

7. Count stock, calculate amount to order, use MSI machine to order and transmit, calculate additional goods needed for ad bulletins and endcap programs.

8. Read, plan and stock schematics for proper merchandising.

9. Practice cash control policies; including check approvals, refund and exchange approvals, layaway approvals (when applicable).

10. Work as Cashier when needed and be able to perform all Cashier tasks, including but not limited to:

- Ring up sales on cash register, receive money/check and count correct change to customer; hold and use register key while on shift.

- Scan merchandise labels and place merchandise in bags.

- Count money in cash register when coming on and leaving shift; write and sign the Balance & Declare Slip at end of shift.

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• Clean cash register area using cleaning solutions and paper towels; sweep mat, dressing room and entry areas as necessary.

• Verbally greet each customer as they enter the store; receive bags and staple labels to each bag customer brings into store.

• Straighten and restock gum, candy and other areas on register.

• Attach labels and software to merchandise using Meto gun; place price stickers on hardliners merchandise; read pre-printed labels and use Swiftach machine to attach softline merchandise.

• Place merchandise on correct clothes hangers, button/zip and hang on rack as needed.

• Cut register tapes and tape to appropriate packages.

• Unpack shipping packages (totes) and prepare for shelf placement.

• Monitor dressing room, including opening door, counting merchandise and checking after customer leaves.

- Watch suspected shoplifters; ring front bell to notify other employees of situation needing help.

11. Work as Stock Clerk when needed and be able to perform all Stock Clerk tasks including but not limited to:

- Unload incoming freight off trucks; count incoming boxes and verify correct receipt and log in freight log.

- Open boxes, check for damaged goods and remove merchandise.

- Stock shelves with merchandise, including bulky and heavy goods.

- Pack merchandise, complete transfer labels and seal cartons for outgoing shipment.

- Organize and maintain layaway bins.

- Maintain organization of sign and pricing area.

- Store and remove seasonal repacks as necessary.

- Perform simple maintenance such as changing light bulbs, moving shelving and panels.

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The overwhelming evidence showed that Plaintiff store managers exercise little discretion and spend 80 to 90% of their time performing manual labor tasks, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Even as to the assigned management tasks, such as paperwork, bank deposits, and petty cash, the store manual strictly prescribes them. And district managers closely scrutinize store managers to ensure compliance with the manual and corporate directives.

Family Dollar forbids outside janitorial help, and store managers lack authority to hire outside vendors. Store managers, just as hourly employees, are expected to clean the store. For the purposes of "End of Day Recovery," the manual requires that "[t]wo hours before closing, all employees are to stop their current projects and begin a systematic cleaning and straightening up of the store. (The only exception would be the Cashier who is ringing up sales.) If the store has been shopped heavily, more time may be required to satisfactorily recover." The manual specifies the trash must be emptied (after checking for hot cigarette butts), the floors must be swept every day, and the floors must be mopped with clear water at least once a week. Rest rooms must be cleaned and mopped daily, stocked with toilet tissue, paper towels, and a trash container that is to be emptied daily. "Under no circumstances should there be merchandise, equipment or fixtures in the rest rooms."

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Store managers routinely perform janitorial duties. The manual even prescribes how janitorial tasks are to be performed:

> Each morning the sidewalk is to be swept, the parking lot is to be free of debris, the rides wiped clean and checked for safety reasons, the drink machine wiped clean, the trash cans emptied, the window ledges cleaned of cobwebs and dust, and the windows washed as necessary.
>
> Weeds must be removed. Do not allow weeds to grow around the building in the front or back. Pay special attention to the sidewalk area in front of the store. Remove any weeds that may be growing here.
>
> The back of the building (the entire perimeter, if the building is free standing) is to be maintained just as the front. No shopping carts, fixtures or blue totes are to be stored outside. If there are problems with people using the store's dumpster or leaving large items behind the store, contact the District Manager for instructions.
>
> . . .
>
> Sweep mats as often as necessary during the day to maintain a clean and neat appearance. If the mat has spots, they are to be removed with a spot remover. Remove chewing gum by hardening the gum with ice, then pulling the gum off.

> If the entrance mats get wet, hang them for a few minutes. The water will drain off the mat.
>
> With respect to indoor janitorial duties:
>
> The windows are to be kept free of cobwebs and dusted daily. The window ledges are also to be maintained daily as needed, free of dust and debris.

Store managers lack discretion over the store's merchandise selection, prices, sales promotions, and layouts—all are set by the home office and district managers. For example, each store is provided a schematic layout and diagram of the store which shows (1) where each shelf must be, (2) what product goes on each shelf, (3) how all merchandise is to be displayed, (4) how all signs, merchandising, and display information is to be used, (5) how each "end cap" (the end of an aisle or gondola) should be displayed, and (6) what promotional product goes on the end cap. Every month, corporate headquarters mails each store a promotional programs booklet that contains the monthly planning calendar and a number of merchandise programs. The manual admonishes that "any deviation from the company program must have the District Manager's approval."[9]

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9. As provided in the manual, Family Dollar's computer system replenishes "basic merchandise" items. A register informs the system of every sales transaction at the store. Based on prior selling history and the current inventory level, the system determines the amount of goods needed to maintain

(Cont'd)

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The tiniest of details are governed by the manuals. For example, the manual's "Clip Boards in the Office" page details how a store must structure its clip boards.[10] Even the four drawer cabinets, located in every store, are organized identically.[11] The manual also has a subsection on "Break Area and Coffee Pots." It states that "Appliances such as coffee pots, microwave ovens, refrigerators, etc., must be approved by the District Manager. Whoever makes the coffee is responsible for unplugging the coffee pot when not in use." The manual instructs: "Do not use the on/off switch as this can be left on by mistake and create a fire hazard. Make

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the "maximum on hand allowance." In addition, each store orders merchandise on a preassigned order day, which is delivered on a preassigned "truck day."

10. For example, the top row must include, from left to right, Monthly Promotional Programs, Ads and Ad Planners, Pending Schematic and MSI Label Changes, Current Store Order and Stop Shipments, DM Notes and Latest DM Audit, Messages and EDLP Notes, and a Housekeeping Checklist.

11. Drawer One contains the petty cash box, bank deposit bags, register keys, extra keys, stamps, and an extra till bag. Drawer Two houses items such as unauthorized price change reports and area change reports. Drawer Three holds the open direct summary file, packing slips, credit memos, direct shipment notifications, and processed billing summaries. Drawer Four has messages, payroll, personnel, drug screening, resignation verification, employee evaluations, warning forms, blank applications, completed applications, and a variety of other forms.

periodic checks throughout the day and before closing to assure that it has been unplugged."

Store managers must follow strict rules regarding store keys, bank deposits, petty cash, and store operating hours. For example, the manual requires there be $300 in petty cash, divided into $200 in the petty cash-box for making register change, and $50 in beginning funds for each of the two registers. In some cases, the petty cash amount may be increased due to the volume of business with the district manager's and regional vice-president's approval and notification to the Cash and Sales Department. The manual indicates that "[t]he amount of the store's Cash Accumulation is to be set by the District Manager . . . . [and] should be posted in the petty cash box using the 'Cash Accumulation Card.' " Store managers have the same paperwork to do and time frame in which to do it.

Further, each store has a preassigned "truck day" when the company truck delivers merchandise to the store. Because of the volume of unloading and stocking, the store manager always works "truck day." The store manager helps unload 800 to 1,500 cartons from the truck to the storeroom and stock the shelves.

The evidence also showed that store managers are assigned a fixed payroll budget, with total labor hours to come from that budget each week, and are required to use only hourly employees. As detailed later, store managers have scant discretion to act independently of their district managers.

C. Family Dollar Executives

Plaintiffs called two Family Dollar executives who testified about store managers' roles in the Family Dollar corporate hierarchy. Bruce Barkus started with Family Dollar in 1999, oversaw all stores, and reported to the President. He testified that Family Dollar classified store managers as executives, across the board, without ever determining how store managers spent their time:

> Q. Okay. And Family Dollar never did any study of the hours that the store managers were spending in the stores working, have they?
>
> A. No.
>
> Q. And Family Dollar never studied the tasks that the store managers were doing, working in the stores?
>
> A. No.
>
> Q. Family Dollar's never studied or tried to determine how much time they spent on each task in the stores?
>
> A. There was some work done on the door to floor, you know, how much time was receiving trucks.
>
> Q. But that was not for purposes of looking at their managerial duties?

A. No, sir.

Q. Family Dollar's never studied or looked into the managerial duties or the amount of time spent on managerial duties by store managers, have they?

A. No, sir.

Q. And Family Dollar's never done a study or attempted to determine whether store managers are, in fact, bona fide executives, exempt from overtime, have they?

A. No.

Q. In fact, Family Dollar doesn't even have a policy addressing Fair Labor Standards Act overtime requirements, does it?

A. Not that I am aware of.

Barkus testified that in a study of how much time it took to unload trucks and get merchandise to the floor, that the "biggest chunk of the store manager's time was being spent on manual labor, unloading the trucks, getting it to the floor, and onto the shelves."

Barkus also testified that district managers ensure that store managers do not exceed the fixed payroll budgets assigned by corporate management. A store manager that goes over budget, by even a penny, could

be fired.[12] Because store managers are under orders that overtime labor is not allowed, they are required to do any and all work, even if the payroll budget does not allocate enough hourly employees to get the job done.[13] Cuts to a store's payroll budget necessarily reduce a store's workforce and ensure that the salaried store manager (and not the hourly employees) makes up the difference by working more hours.[14]

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12. "Q. But they have to get district manager approval if they go outside the budget, and are subject to discipline if they don't? A. They could be subject to discipline, but there's many times that they don't get approval to go outside the budget. Q. But there's also been times, as we see in these emails, where they're threatened with their job if they go one penny over their budget that's been given to them by their district manager; correct? A. I'm sure you have a document that shows that, yes."

13. "Q. And the budget limits how much payroll they have; in fact, it's just a payroll budget, isn't it? A. The budget's based on sales and store hours and then other factors. Q. Those are the elements that go into the budget. But the budget itself is just covering payroll, nothing but payroll; correct? A. It's covering hours, associate hours. Q. It tells how many associate hours that managers are allowed to have? A. Yes. Q. If that's not enough, he has to do it himself, work whatever hours it takes; right? A. Yeah. The job has to get done."

14. Plaintiffs' counsel confronted Barkus with his deposition testimony:

> Q. But you've known—we took your deposition in 2002—you told us then that that's the way the system

(Cont'd)

Appendix A

Almost all of the store manager's job is standardized and controlled by superiors. Barkus confirmed that Family Dollar makes virtually no distinction between a store manager's job duties and an assistant store manager's job duties.[15]

(Cont'd)

> works; the budget staffs the store at just a certain level, and the store manager has to make up all the other hours? A. Can you point that out to me? Q. Yes. Turn to Page 322 of your deposition. And, again, it's shifted a little bit. It's 324, line 11. "Question: In many instances, the store managers will assume the duties of those associates so that their budget stays in line, or they come in under budget; correct? Answer: Yes." A. That's correct.
>
> . . .
>
> Q. And, in fact, the people under you, your district managers, they have sent emails out saying to the store managers, "I'm cutting your budget." It means, I'm taking away the hours of your subordinates; and you work the hours, 60, 70, 80, hours, whatever, haven't they? A. I haven't seen it, but I'm sure you're referring to something. Q. Yes. Exhibits 18 and 19, 25 through 29, 32, 33, 45, 154, 168; you go through the book, you see it over and over. I'm taking your budgets away. You work the hours.

15. "Q. Do you recall the 'Essential Job Functions of the Assistant Store Manager'? A. Yes, I do . . . . Q. And the assistant store manager job description, called Essential Job Functions, is Exhibit 7. It shows that the assistant store manager, his (Cont'd)

Plaintiffs also offered the testimony of Charles William Broome, a Senior Vice-President of Store Operations, who supervised 1,400 Family Dollar stores. Like Barkus, Broome confirmed that Family Dollar never studied whether store managers were exempt executives[16] and its exemption policy did not turn on any individual factors. It was a company wide decision that applied regardless of store size, location, sales volume, or any other individual factors:

> Q. You're the official company spokesman, as you told us; correct? Now, Family Dollar has simply said all the store managers are exempt, every one of them; right?
>
> A. Yes, sir.
>
> Q. They hadn't looked at store size?
>
> A. I—I don't know how to answer that. Store managers have been salaried for the 29 years

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(Cont'd)
regularly assigned essential duties are the same ones as for the store manager; virtually word for word; correct? A. Yes." Other evidence showed that hourly assistant managers performed the same tasks as the store manager.

16. "Q. Now, Family Dollar has not done a study about the duties of store managers in relation to whether they should be exempt or non-exempt for overtime purposes, has it? A. Not that—I don't know, not that I'm aware of."

that I've been here; they were when I came. I don't know how that was arrived at.

Q. Okay. Let me ask you this. You said every store's manager is considered exempt. And when you said "every", you meant regardless of store size, number of employees, whether it's rural or urban, no matter what its risk class, no matter what its sales volumes, no matter what its profits, no matter what anything; you just said they're all exempt, didn't you?

A. All of our managers are salaried, yes, sir, in every store.

Q. Doesn't matter how many employees are in the store, they're just all exempt?

A. All the stores of Family Dollar, yes, sir.

Despite his 29-year tenure with Family Dollar, Broome had no idea where the exemption decision originated:

Q. Now, my question is, did you make that decision?

A. No, sir.

Q. Did your boss, Mr. Barkus, make that decision?

A. To my knowledge, it's been in place—it was in place when I came here 29 years ago. So—

Q. Okay. So, do you know anybody that will own up to that decision; say, "that was my decision"?

A. I do not.

Q. Mr. Levine, has he ever told you that's his decision?

A. No, sir.

Q. Can you give us any clue? And the reason I'm asking you this, I asked you this in the deposition and we've been asking a lot of people in depositions: Who made this decision, do you know?

A. I do not.

Broome acknowledged that hourly assistant managers fill in for store managers, open and close the store, can perform all managerial tasks of the store manager, and are eligible for overtime pay.

Broome confirmed that a store's payroll budget, the budgetary outlay that dictates how many employees can work in the store, is determined by corporate

headquarters in conjunction with the district manager. Store managers are prohibited from exceeding the payroll budget and can be fired if they do.[17]

Family Dollar's corporate office generates a "staff scheduler" that uses the amount of money that the store may spend on labor and converts it into a document that delineates how many hours a week each employee should work and the total weekly labor hours for the store. According to the staff scheduler, each store manager is supposed to work 52 hours a week. Broome testified that, generally, store managers are expected to work between 48 to 52 hours, but that "as manager of the store, you're required to manage the store and do whatever it takes. I don't know that there is a specific number that's mandated."[18]

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17. "Q. If a store manager, though, goes over budget, he spends more than what he's been given by his district manager, he can be disciplined; right? A. Could be, yes . . . . Q. But you remember when I showed you store managers who were—they were threatened to be fired for going over budget; you remember that, don't you? A. There have been e-mails written stating that, yes, sir. Q. And those e-mails came from district managers to store managers telling them they'd be disciplined or fired if they spent one dime, one penny, over the budget that that district manager had given them; right? A. I don't remember the specific words, but, yes. They said that you could be disciplined up to and including termination for doing something."

18. "Q. And it always shows 52 hours for the store manager; correct? A. To the best of my knowledge, yes. Q. Because the

(Cont'd)

Appendix A

Broome's testimony was consistent with Family Dollar's "Staff Schedule Frequently Asked Questions" ("FAQ"). As to whether store managers can increase or reduce associate hours, the FAQ says they may "as long as total hours & coverage for each day & week are not increased or decreased." Similarly, as to whether the store manager can change the schedule to work "a 5 ½-day workweek instead of a 5-day workweek," the FAQ says that "[t]his change can only be made by the District Manager and should only be made as long as total hours & coverage for each day are not increased or decreased." In other words, any flexibility store managers have in scheduling is substantially constrained by the fixed payroll budget which dictates the total labor hours.

Although store managers can schedule what employees work what hours on the "weekly staff schedule" so long as the store does not exceed the payroll budget,[19] certain corporate directives further

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(Cont'd)
system is built—that is, the staff scheduler system and the store payroll budget is built on the 52-hour week assumption for the last several years, for store managers; right? A. The staff scheduler is built with 52 hours as a base for the manager, the manager's salary. So the number of hours they could work 40 and still receive their salary, or they could work 60 and still receive their salary. But it's built using that as part of the coverage."

19. Some district managers showed on the staff scheduler the days and hours that assistant managers and sales associates (Cont'd)

constrain store managers' discretion, such as the prohibition on moving employee coverage from slower days (like weekdays that did not involve unloading truck shipments) to busier days.[20]

Finally, the FAQ evinces Family Dollar's strict rules against scheduling employee overtime. The FAQ indicates that store managers cannot change the schedule of assistant managers to reflect a 48 to 52 hour workweek while they are training, and that "[i]f the change is made [by the district manager] the total hours & coverage for each day should not be increased or decreased and the store payroll budget must be met. It is very important to control the use of overtime dollars."

D. District Managers

Family Dollar's 380 district managers implement and enforce these policies and procedures. Their

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(Cont'd)
worked. But others allowed their store managers to plug in who worked when so long as they did not exceed the total allotted labor hours for the week.

20. As Broome testified: "Q. Can I move coverage from slower days, (i.e., non-truck weekdays) to Fridays, Saturdays or Sundays when we are busy? A. No. Store's schedules are designed to give coverage that are based on store volumes, store hours. Q. So this is telling store managers they can't schedule people the way they want to schedule them; correct? A. It's basically telling them they should not move coverage from slow days to the weekend."

vigorous oversight ensures that store managers comply with the operations manual's precise dictates. The operations manual states that the district managers—not the store managers—head the "store team."[21]

District managers uniformly run their stores through strict payroll budgets, to-do lists, daily emails with instructions to store managers, telephone calls, store visits, electronic execution reports, and electronic data flowing from the store's cash register on a real-time basis.[22]

Plaintiffs' witnesses explained how Family Dollar's corporate office sets a fixed payroll budget for each store and how that budget results in salaried store managers working long hours each week. The district manager transmits a set payroll budget for the upcoming 13-week period to the store managers. The budget shows the store manager's salary and a preset number of labor hours a week (to be worked by hourly employees) that must be paid for from that budget. Other than the

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21. A portion of Family Dollar's Professional Development Training Reference Book describes the "Family Dollar Store Team" in order of seniority as District Manager, Store Manager, Assistant Manager, and Associates.

22. District managers visit each store at least once a month and some visit twice a month or more. The job description for a district manager states: "Visit stores, continuously developing plans to improve performance. One store per day is to be worked Monday through Thursday, with multiple stores on Friday and Saturday if desired unless otherwise directed."

salaried store manager, Family Dollar staffs every store with only hourly employees (either the assistant manager or sales associates).[23] District managers then closely monitor each store's weekly payroll to ensure store managers do not allow overtime work and stay strictly within the fixed payroll budget and the total labor hours allotted. Plaintiffs introduced numerous emails confirming this fact.[24]

For example, at a low volume, small store, the district manager sets the store's payroll budget at around $1,400 per week. The average store manager's salary of $600 per week comes out of this budget. The remaining $800 pays the hourly employees. The payroll budget is often only enough to pay one full-time hourly assistant manager and two or three hourly sales associates. Because the store is open seven days a week and store managers are not permitted to unilaterally

23. Assistant managers work full-time, while sales associates work either part- or full-time.

24. According to the manual, district managers monitor the payroll budget by requiring every store manager to key payroll hours into the Payroll Daily Form. Store managers must enter payroll hours at the end of the day for employees that have clocked out for the day or "first thing in the morning for the employees who worked the previous day." Every Wednesday, store managers are required to print out and transmit the Payroll Daily Form. At the end of each week, store managers must record weekly net sales (i.e., the figure from the "Beat Yesterday Book") and actual payroll dollars spent, and send this information to their district managers.

schedule hourly staff for overtime, store managers routinely worked 60 to 70 hours a week to have enough floor coverage during the set store hours[25] and to complete the required manual labor.

For higher volume, larger size stores, the corporate office sets a larger payroll budget, which usually covers more hourly employees (seven to ten). But larger stores have more merchandise to stock, more cartons to unload on truck day, a need for more cashiers, and more demand for cleaning. Because the payroll budget is fixed and strictly monitored, store managers at larger stores, just like those at smaller stores, routinely work 60 to 70 hours per week and spend 80 to 90% of their time on manual labor.

District managers closely supervise the hiring and firing process. They interview and hire store managers

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25. The manual requires all Family Dollar stores to be open seven days a week for the entire year, except for Christmas Day. Corporate headquarters sets the hours-nine a.m. to seven or eight p.m. on Monday through Saturday, and noon to six p.m. on Sunday. Each store is open 72 hours a week. Only headquarters or a district manager can change a store's hours.

The manual states that "there are only two sets of keys to a Family Dollar Store." One set is for the store manager, who "should maintain possession of his or her keys at all times," and the other set is held by the assistant manager or the floor supervisor. The manual allows for a third key to be given to another employee for emergency purposes, but that employee must be recommended by the store manager and approved by the district manager.

and interview and approve the hiring of assistant managers.[26] Store managers initially interview assistant manager candidates and make recommendations to the district manager. The manual states that a "job offer is not to be made until . . . Management has received authorization to hire."

Although store managers interview and recommend hourly associate candidates, they need district manager approval to hire them. The district manager—not the store manager—also has the authority to terminate employees.[27] The manual notes that "[p]rior to

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26. Broome testified about hiring: "Q. In fact, if a store manager were to attempt to hire his own assistant without the district manager interviewing and selecting the person, they could be disciplined and fired, couldn't they? A. If they had not been given that authority by the district manager, they could be. Yes, sir. Q. I'm talking about the company policy is, that if a store manager tries to hire his own assistant instead of having the district manager do the interview and doing the hiring, they are subject to discipline, aren't they? A. They could be, yes, sir."

27. Barkus testified:

> Q. And you don't know of any training or instructions that have been given to store managers which tells them that they have the power to discharge a store employee, do you?
>
> A. I don't know of any, no.
>
> Q. And you don't know of any instructions or anything the store managers have been told that

(Cont'd)

termination, Store Management should discuss the situation and its recommendation with the District Manager, or if unavailable, with the Regional Vice President."[28]

Most store managers follow corporate policy and obtain the district manager's approval before hiring or firing hourly employees.[29] Family Dollar's policies do not

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(Cont'd)

says that they can suspend an employee in their store on their own either, do you?

A. I don't know of any, no.

Q. And, in fact, you issued an email in February 2003, which told the store managers that if they tried to hire their own assistants on their own, they would be subject to being fired, terminated, didn't you?

A. Yes, I did.

Q. And you recall no point in time during your seven years at Family Dollar that that wasn't the policy, do you?

A. No, I don't.

28. In addition, "Strand 4" of Family Dollar's Professional Development Training Reference Book provides that, "You must contact your District Managers or Regional Vice President before conducting a Discharge."

29. Some district managers allow their store managers to ignore corporate policy and hire candidates for hourly sales associates positions without obtaining district manager approval. The manual states the district manager usually meets the associate on her next store visit.

require that store managers' hiring or firing recommendations be given any particular weight. Barkus testified that district managers can veto all store managers' recommendations on hiring and firing. However, district managers frequently follow the store managers' hiring and firing recommendations.

District managers set the rate of pay for all hourly employees (assistant managers and sales associates) and must approve all pay increases.[30] District managers also evaluate hourly employee performance.[31]

Only district managers have the power to close a store for bad weather. In the "Hurricane Warning Procedures" section, the manual instructs store

30. The manual indicated that district managers must approve hourly associate raises. "The District Manager will review wage increase recommendations with the Regional Vice President. Store Managers will be informed whether or not the recommendations are granted."

31. Plaintiffs' Trial Exhibit 294 (referencing various portions of "Strand 4") states that:

> The Retention Review allows the Store Manager and District Manager to conduct a 90-day performance appraisal, provide feedback and coaching for Store Associates and to advise them of their eligibility for certain employee benefits. . . . DM will schedule in-store visits with all associates who will soon "hit" their 90-day milestone. . . . Store Manager and District Manager meet with Associate and review information contained in Retention Review.

managers that "[i]f the District manager cannot be located, contact the Regional Vice-President for recommendations regarding the course of action that should be taken."

E. Salary Compared to Hourly Wages

Both parties submitted evidence documenting the average weekly salaries of all Plaintiffs and the average hourly wages of assistant managers. Plaintiffs' evidence showed that, from 1999 to 2005, Plaintiff store managers averaged $599.71 a week in salary.[32] Despite the fact that

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32. These are the average salaries for all Plaintiffs (using their Exhibit 278) and Family Dollar's average salaries for all store managers nationwide (using its Exhibit 2324):

All Plaintiffs' Salaries	*Nationwide Salaries*
(526) 1999: $523	1999: $553
(882) 2000: $542	2000: $573
(940) 2001: $555	2001: $596
(684) 2002: $581	2002: $601
(249) 2003: $623	2003: $606
(123) 2004: $668	2004: $628
(86) 2005: $706	2005: $651

The two sets of figures do not differ materially. For example, there is only a 5% difference between the 1999 salaries. Plaintiffs' figures (for 2003 to 2005) benefit Family Dollar by suggesting that Plaintiffs made more per hour than Family Dollar attempted to show.

Store managers may earn a bonus. Although Family Dollar's brief cites testimony by a few store managers showing (Cont'd)

the salary was intended to compensate a 52-hour workweek, store managers worked 60 to 70 hours a week. In other words, from 1999 to 2005, Plaintiff store managers averaged from $9.99 an hour (using Plaintiffs' average salary figures and a 60-hour workweek) to $8.57 an hour (using Plaintiffs' average salary figures and a 70-hour workweek). During the same years, assistant managers were paid hourly and averaged $7.60 an hour.[33]

(Cont'd)

that the average bonus size was $1,800, it is difficult to factor the bonus into the salary spread between store managers and assistant managers without an indication of how often Family Dollar paid such bonuses and to what percentage of store managers. In any event, the bonus does not substantially increase the range of pay. For example, even if every store manager earned a $1,800 bonus every year, that translates into $34.61 more per week. Assuming a 60-hour workweek, that equals an extra $.58 more an hour. Assuming a 70-hour week, it amounts to $.49 more an hour. These small amounts do not alter the analysis of whether store managers earn "significantly" more than assistant managers.

33. Average hourly salary for store managers:

Store Manager's Salary ÷60 hours:	*Store Manager's Salary ÷70 hours:*	*Assistant Manager's Hourly Wage*
1999: $ 8.72	1999: $ 7.47	1999: $7.11
2000: $ 9.03	2000: $ 7.74	2000: $7.19
2001: $ 9.25	2001: $ 7.93	2001: $7.43
2002: $ 9.68	2002: $ 8.30	2002: $7.65
2003: $10.38	2003: $ 8.90	2003: $7.79
2004: $11.13	2004: $ 9.54	2004: $7.88
2005: $11.77	2005: $10.09	2005: $8.18

Assuming a 70-hour workweek, store managers earned, on average, roughly the same (less than a dollar or more per hour) than assistant managers. Assuming a 60-hour week, store managers earned approximately $2 more per hour than assistant managers in 1999 to 2003 and approximately $3 more per hour in 2004 to 2005. In either event, both sides presented this evidence in order to compare store manager salaries to the salaries of hourly store employees.

F. Judgment/Verdict

At the close of the evidence, the district court granted judgment as a matter of law to 163 of the 1,424 Plaintiff store managers, because, according to Family Dollar's charts, these 163 did not satisfy the third requirement in the executive exemption test, i.e., that they customarily and regularly directed the work of two or more other employees, as required by 29 C.F.R. § 541.1(f) (2003), 29 C.F.R. § 541.100(a) (2006). As to the remaining Plaintiffs, the jury determined Family Dollar failed to prove they were exempt executive employees.

The jury also found that Family Dollar acted willfully in denying overtime pay to all Plaintiffs. The jury awarded $1,575,932.12 in overtime pay to the 163 Plaintiffs and $17,516,071.27 in overtime pay to the remaining Plaintiffs. In calculating this overtime pay, the jury used Family Dollar's charts that documented (1) the number of hours that each of the Plaintiffs worked

per week, and (2) the amount of back pay owed per Plaintiff for the applicable period.[34]

III. DECERTIFICATION

A. FLSA's Similarly Situated Requirement

The FLSA authorizes collective actions against employers accused of violating the FLSA. 29 U.S.C. § 216(b). Section 216(b) provides that "[a]n action . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or

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34. This $1,575,932.12 to 163 Plaintiffs and $17,516,071.27 to the remaining Plaintiffs totaled $19,092,003.39. Although Plaintiffs requested a much larger amount of back pay based on a rate of pay using either a 40-hour or 48-hour workweek, the $19,092,003.39 sum represented Family Dollar's own calculation of overtime back pay based on Defendant's Trial Exhibit 1959, and reflected a rate of pay based on a salary intended to compensate for a 52-hour workweek. In other words, Family Dollar's chart divided the store managers' base salary by 52 hours (not 40 or 48 hours) to determine the hourly rate of pay for Family Dollar's overtime pay calculations. Thus, the jury's use of Family Dollar's calculations substantially reduced the verdict amount, and there is no cross-appeal on that issue.

After the verdict, the district court twice adjusted the back pay amount for certain Plaintiffs for various reasons (such as bankruptcy, judicial estoppel, and standing), and ultimately entered a March 31, 2006 judgment for back pay of $16,623,989.32, and increased the amount by $1,164,040.42 on April 6, 2007, for a total back pay judgment of $17,788,029.74.

themselves and other employees similarly situated." 29 U.S.C. § 216(b). Thus, to maintain a collective action under the FLSA, plaintiffs must demonstrate that they are similarly situated. *See Anderson v. Cagle's*, 488 F.3d 945, 952 (11th Cir. 2007).

Participants in a § 216(b) collective action must affirmatively opt into the suit. 29 U.S.C. § 216(b) ("No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought."). That is, once a plaintiff files a complaint against an employer, any other similarly situated employees who want to join must affirmatively consent to be a party and file written consent with the court. *Albritton v. Cagle's*, 508 F.3d 1012, 1017 (11th Cir. 2007).[35]

Because similarly situated employees must affirmatively opt into the litigation, the decision to certify the action, on its own, does not create a class of plaintiffs. Rather, the "existence of a collection [sic] action

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35. In *Albritton*, we stated: "[Section] 216(b) requires that would-be plaintiffs affirmatively opt in, and that they do so in writing, and that the writing be filed in court before they can be included in the lawsuit." 508 F.3d at 1017. The FLSA "does not indicate that opt-in plaintiffs have a lesser status than named plaintiffs insofar as additional claims are concerned. To the contrary, by referring to them as 'party plaintiff[s]' Congress indicated that opt-in plaintiffs should have the same status in relation to the claims of the lawsuit as do the named plaintiffs." *Prickett v. DeKalb County*, 349 F.3d 1294, 1297 (11th Cir. 2003).

under § 216(b) . . . depend[s] on the active participation of other plaintiffs." *Cameron-Grant v. Maxim Healthcare Servs. Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003) ("Under § 216(b), the action does not become a 'collective' action unless other plaintiffs affirmatively opt into the class by giving written and filed consent.").[36] The benefits of a collective action "depend on employees receiving accurate and timely notice . . . so that they can make informed decisions about whether to participate." *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 486, 107 L.Ed.2d 480 (1989). Therefore, the importance of certification, at the initial stage, is that it authorizes either the parties, or the court itself, to facilitate notice of the action to similarly situated employees. *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001).[37] After being

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36. Unlike opt-in collective actions under § 216(b), a district court's decision to certify a Rule 23(b) class binds all the class members. *See Cameron-Grant*, 347 F.3d at 1249 (detailing the wide range of differences between § 216(b) collective action and Rule 23 class action); *see also Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096 n.12 (11th Cir. 1996) ("[I]t is clear that the requirements for pursuing a § 216(b) class action are independent of, and unrelated to, the requirements for class action under Rule 23 of the Federal Rules of Civil Procedure.").

37. Although *Hipp* involved a collective action brought under the Age Discrimination and Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.*, that statute incorporates the FLSA's collective action mechanism, *see* 29 U.S.C. § 626(b). Therefore, "*Hipp* . . . applies in both contexts." *Albritton*, 508 F.3d at 1014 n. 1; *Cameron-Grant*, 347 F.3d at 1243 n.2.

given notice, putative class members have the opportunity to opt-in. The action proceeds throughout discovery as a representative action for those who opt-in. *See id.*

The key to starting the motors of a collective action is a showing that there is a similarly situated group of employees. *See Anderson,* 488 F.3d at 953; *Hipp,* 252 F.3d at 1217. The FLSA itself does not define how similar the employees must be before the case may proceed as a collective action. And we have not adopted a precise definition of the term.

Without defining "similarly," we provided some guidance in *Dybach v. State of Florida Department of Corrections,* 942 F.2d 1562, 1567 (11th Cir. 1991). There, we emphasized that before facilitating notice, a "district court should satisfy itself that there are other employees . . . who desire to 'opt-in' and who are 'similarly situated' with respect to their job requirements and with regard to their pay provisions." *Id.* at 1567-68. Later, in *Grayson v. K Mart Corp.*, we instructed that under § 216(b), courts determine whether employees are similarly situated—not whether their positions are identical. 79 F.3d 1086, 1096 (11th Cir. 1996). In other words, we explained what the term does not mean—not what it does.[38]

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38. It appears that we are not the only ones. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir. 2001) (referring to Eleventh Circuit's "ad hoc" approach as "[a]rguably . . . the best of the three approaches" taken by (Cont'd)

Further, we review a district court's § 216(b) certification for abuse of discretion. *Hipp,* 252 F.3d at 1217; *Grayson,* 79 F.3d at 1097. Judicial discretion in making a § 216(b) certification decision is, of course, not unbridled. Indeed, " '[a] district court abuses its discretion if it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous.' " *Anderson,* 488 F.3d at 953-54 (quoting *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.,* 263 F.3d 1304, 1309 (11th Cir. 2001)). The district court first must apply the proper legal standards for authorizing a § 216(b) collective action and for determining what similarly situated means. A court's determination that the evidence shows a particular group of opt-in plaintiffs are similarly situated is a finding of fact. *Anderson,* 488 F.3d at 954 (affirming decision to decertify based on conclusion "that the district court's view of the evidence is reasonable, and its findings, therefore, are not clearly erroneous"); *Hipp,* 252 F.3d at 1208 (noting that decertification decision is one where the court "makes a factual determination on the similarly situated question"). We will reverse the district court's fact-

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various circuits, refusing to endorse any particular approach, and reviewing for "abuse of discretion"); *Mooney v. Aramco Servs. Co.,* 54 F.3d 1207, 1213-16 (5th Cir. 1995) (describing it as "remarkable" that a number of courts have failed to formally define "similarly situated," referring to such approaches as "ad hoc," but refusing to adopt any formal definition or set of factors), *overruled on other grounds by Desert Palace, Inc. v. Costa,* 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003).

finding that Plaintiffs are similarly situated only if it is clearly erroneous—not simply because we might have made a different call. *Anderson*, 488 F.3d at 953-54 (citing *McMahan v. Toto*, 256 F.3d 1120, 1128 (11th Cir. 2001)).

B. Two-Stage Procedure for Determining Certification

While not requiring a rigid process for determining similarity, we have sanctioned a two-stage procedure for district courts to effectively manage FLSA collective actions in the pretrial phase. The first step of whether a collective action should be certified is the notice stage. *Anderson*, 488 F.3d at 952-53; *Hipp*, 252 F.3d at 1218. Here, a district court determines whether other similarly situated employees should be notified.

A plaintiff has the burden of showing a "reasonable basis" for his claim that there are other similarly situated employees. *See Anderson*, 488 F.3d at 952; *Grayson*, 79 F.3d at 1097; *Haynes v. Singer Co.*, 696 F.2d 884, 887 (11th Cir. 1983).[39] We have described the standard for

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39. "In *Grayson*, we interpreted the FLSA's collective action provision to require plaintiffs alleging age discrimination to 'demonstrat[e] a reasonable basis for their claim of class-wide discrimination . . . by making substantial allegations of class-wide discrimination, that is, detailed allegations supported by affidavits which successfully engage defendants' affidavits to the contrary.' " *Anderson*, 488 F.3d at 952. Likewise, in *Haynes*, we stated: "As a preliminary matter, it is not disputed that plaintiffs have the

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determining similarity, at this initial stage, as "not particularly stringent," *Hipp*, 252 F.3d at 1214, "fairly lenient," *id.* at 1218, "flexib[le]," *id.* at 1219, "not heavy," *Grayson*, 79 F.3d at 1097, and "less stringent than that for joinder under Rule 20(a) or for separate trials under 42(b)," *id.* at 1096. In 2007, we recounted our law and noted that at the initial stage, courts apply a "fairly lenient standard." *Anderson*, 488 F.3d at 953; *see Hipp*, 252 F.3d at 1218. The district court's broad discretion at the notice stage is thus constrained, to some extent, by the leniency of the standard for the exercise of that discretion. Nonetheless, there must be more than "only counsel's unsupported assertions that FLSA violations [are] widespread and that additional plaintiffs would come from other stores." *Haynes*, 696 F.2d at 887.

This first step is also referred to as conditional certification since the decision may be reexamined once the case is ready for trial. *Albritton*, 508 F.3d at 1014 (discussing *Hipp*'s first stage as "conditionally certifying the collective action"); *Anderson*, 488 F.3d at 952 (stating district court certified collective action, "but only conditionally," noting the possibility of later decertifying once discovery is substantially over).[40]

(Cont'd)
burden of demonstrating a reasonable basis for crediting their assertions that aggrieved individuals existed in the broad class that they proposed." *Haynes*, 696 F.2d at 887.

40. District courts following the two-step *Hipp* approach should treat the initial decision to certify and the decision to (Cont'd)

The second stage is triggered by an employer's motion for decertification. *Anderson*, 488 F.3d at 953. At this point, the district court has a much thicker record than it had at the notice stage, and can therefore make a more informed factual determination of similarity. *Id.* This second stage is less lenient, and the plaintiff bears a heavier burden. *Id.* (citing *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1103 (10th Cir. 2001)).

In *Anderson*, we again refused to draw bright lines in defining similarly, but explained that as more legally significant differences appear amongst the opt-ins, the less likely it is that the group of employees is similarly situated. *Id.* ("Exactly how much less lenient we need not specify, though logically the more material distinctions revealed by the evidence, the more likely the district court is to decertify the collective action."). We also refused to "specify how plaintiffs' burden of demonstrating that a collective action is warranted differs at the second stage." *Id.* Rather, we emphasized the fact that the "ultimate decision rests largely within the district court's discretion," and clarified that in order to overcome the defendant's evidence, a plaintiff must rely on more than just "allegations and affidavits."

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notify potential collective action members as synonymous. Indeed, *Hipp* collapses the two questions by describing the first stage of certification as "the notice stage." *Hipp*, 252 F.3d at 1218. Our circuit precedent on notice is, for the purpose of a *Hipp* analysis, the same as our law on the question of conditional, and initial, certification.

Id. Because the second stage usually occurs just before the end of discovery, or at its close, the district court likely has a more extensive and detailed factual record.

In *Anderson*, we also quoted approvingly of *Thiessen*, where the Tenth Circuit identified a number of factors that courts should consider at the second stage, such as: "(1) disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to defendant[s] [that] appear to be individual to each plaintiff; [and] (3) fairness and procedural considerations[.]" *Anderson*, 488 F.3d at 953 (quoting with approval *Thiessen*, 267 F.3d at 1103); *see also Mooney*, 54 F.3d at 1213 n.7, 1215-16. Thus, at the second stage, "although the FLSA does not require potential class members to hold identical positions, the similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions" and encompass the defenses to some extent. *Anderson*, 488 F.3d at 953 (citation and quotation marks omitted). For example, the district court must consider whether the defenses that apply to the opt-in plaintiffs' claims are similar to one another or whether they vary significantly. *Id.* at 954 n.8 (noting that all named plaintiffs were unionized but some opt-in plaintiffs were not, making the collective bargaining agreement defense applicable to some but not all plaintiffs). But ultimately, whether a collective action is appropriate depends largely on the factual question of whether the plaintiff employees are similarly situated to one another.

C. District Court's Denial of Decertification

Turning to this case and applying our circuit precedent, we conclude that Family Dollar has not shown that the district court abused its discretion in denying Family Dollar's motion for decertification.

First, the district court not only properly followed the two-stage procedure for certifying a § 216(b) collective action but also demanded even more evidence than required before certifying the case at the first notice stage. We recounted the procedural background at great length because it readily reveals that the district court proceeded very cautiously and required much more than mere allegations of similarity. The district court denied stage one certification two times, without prejudice, and continued to reexamine its decision as the parties gathered and presented additional evidence. The district court conditionally certified the collective action only after the parties filed the depositions of the named Plaintiffs and multiple affidavits and after making detailed fact-findings that Plaintiffs' jobs were similar.[41]

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41. In some cases, the district court's first-stage certification analysis is properly based on plaintiffs' pleadings and affidavits, *Anderson*, 488 F.3d at 952-53, or on affidavits and deposition transcripts, *Cameron-Grant v. Maxim*, 347 F.3d 1240, 1244 (11th Cir. 2003); *Grayson*, 79 F.3d at 1097. Sometimes only limited information is available at the notice stage and detailed pleadings and affidavits may suffice. We do not hold that the amount of discovery that preceded the first-stage certification here is required but only that the district court had an ample "reasonable basis" to support its 2002 certification order.

Subsequently, after three more years of discovery, the district court relied on a fully developed record when it denied Family Dollar's motion for decertification, and again based its decision on detailed fact-findings. The procedural background shows that the issue of whether these 1,424 Plaintiffs were similarly situated was exhaustively litigated in the district court for over four years. At each step of the process, the district court also applied the correct legal standards under the FLSA for collection actions.

Second, and more importantly, ample evidence supports the district court's fact-findings that the Plaintiff store managers were similarly situated under § 216(b). The district court, at the second stage, had a complete and comprehensive record and found that the opt-in store managers were factually similar in a number of respects including: (1) their universal classification as store managers with the same job duties; (2) the small fraction of time they spent on managerial duties; (3) the large amount of time they spent on non-managerial duties such as stocking shelves, running the cash registers, unloading trucks, and performing janitorial work; (4) the restrictions on their power to manage stores as compared to the district manager's sweeping managerial discretion; (5) the amount of close district manager supervision of store managers; (6) the lack of managerial discretion that Family Dollar corporate policies afforded to store managers; (7) their day-to-day responsibilities; (8) their receiving base salaries regardless of the hours worked and no overtime pay; (9) their sharing certain managerial duties with hourly

employees; (10) their maintaining production and sales records; (11) their inability to authorize pay raises; (12) their power to train subordinates; (13) their restricted authority to close stores in the event of emergencies; and (14) their inability to select outside vendors without district manager approval.[42]

We recognize Family Dollar's assertion that the duties of store managers varied significantly depending on the store's size, sales volume, region, and district. But there was scant evidence to support this argument. Rather, the bulk of evidence demonstrated that the store managers were similarly situated and even Family Dollar perceived no such distinction. Indeed, it exempted all store managers from overtime pay

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42. In its 2002 certification order, the district court found that Plaintiffs could not hire, discipline, or terminate employees without district manager approval. In its 2005 order denying decertification, the court narrowed this to assistant managers, finding store managers could not hire, discipline, or terminate assistant managers without district manager approval. As discussed earlier in section II, store managers were generally not authorized to hire or fire assistant managers without district manager approval, which supports the district court's 2005 finding. The evidence shows, however, that store managers could give verbal and written discipline warnings to all employees, including assistant managers. So although the district court erred in this finding as to discipline, the store managers nonetheless remained similarly situated as to discipline of assistant managers and other employees.

requirements without regard to store size, sales volume, region, district, or hiring and firing authority.[43]

As to the second factor, whether there were defenses individual to each Plaintiff, Family Dollar argues the executive exemption defense is always individualized and fact specific, thereby precluding this collective action. As discussed later, applying the executive exemption is "an inherently fact-based inquiry" that depends on the many details of the particular job duties and actual work performed by the employee seeking overtime pay. *See Rodriguez v. Farm Stores Grocery, Inc.*, 518 F.3d 1259, 1263 (11th Cir. 2008). But Family Dollar ignores the overwhelming evidence showing that the Plaintiffs, as a group, shared a number of factual details with respect to their job duties and day-to-day work. Just because the inquiry is fact-intensive does not preclude a collective action where plaintiffs share common job traits. Given the volume of evidence showing the store managers were similarly situated, and the fact that Family Dollar applied the executive exemption across-the-board to every store manager—no matter the size, region, or sales volume of the store—Family Dollar has not shown clear error in the district court's finding that its defenses were not so individually tailored to each

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43. Although the *Grayson* and *Hipp* plaintiffs worked in several states, this Court concluded that they met the similarly situated requirement. *Grayson*, 79 F.3d at 1091; *Hipp*, 252 F.3d at 1219.

Plaintiff as to make this collective action unwarranted or unmanageable.[44]

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44. Family Dollar relies heavily, both in the district court and on appeal, on charts that summarize the store managers' deposition testimony. Family Dollar argues the charts illustrate that store managers' duties differed substantially. Plaintiffs also submitted charts that summarize the similarity in their duties. These charts were not used at trial—only at the decertification stage.

The parties' respective charts not only conflict as to what the deposition testimony shows, but also fail to paint a full picture. For example, according to Family Dollar's chart, Mary Kimsey had the "authority to hire" (depicted by a "Y" in the "Authority to Hire" column). But Kimsey's deposition shows that she lacked the power to hire assistant managers (although she did have the power to hire sales clerks). The chart suggests that she had the power to discipline subordinates. But according to her deposition, her ability to discipline was contingent on district manager approval. Where Family Dollar's chart indicates that Kimsey "set or adjust[ed] the hours of employees," she actually testified that she had some flexibility to adjust hours, but that she was heavily constrained by the corporate planner and the district manager.

Furthermore, Family Dollar's charts do not include all of the factors, discussed later, that courts examine when making an executive exemption inquiry. Family Dollar's charts mostly addressed a store manager's authority to hire, fire, interview, train, and discipline other employees. But they did not address many other aspects of a store manager's day-to-day duties. In any event, the district court was free to assess the quality of the charts, and there was ample evidence to support the court's fact-findings that the Plaintiffs were similarly situated.

As to the third factor, fairness and procedural considerations, we reject Family Dollar's contention that given the size of the class, the individualized application of the exemption defense, and the court's decision to allow representative testimony at trial, any collective action would be inherently unfair. There is nothing inherently unfair about collectively litigating an affirmative executive-exemption defense where the district court has made well-supported and detailed findings with respect to similarity. Indeed, the more similar the employees, the less likely that collectively litigating the executive-exemption issue can be fundamentally unfair. And to repeat, there was abundant evidence that Plaintiffs' actual jobs were the same, or, at a minimum, substantially similar.[45]

In addition, Plaintiffs' evidence established that Family Dollar uniformly exempted all store managers from overtime pay requirements, and its exemption decision did not turn on any individualized factors. Not one. There is nothing unfair about litigating a single corporate decision in a single collective action, especially where there is robust evidence that store managers

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45. We do not suggest that a collective action needs to have 14 significant job factors in common in order to be, or stay, certified or that less commonality would not have survived a decertification motion. Rather, we highlight the number of similarities only to show that the decertification decision is not close here.

perform uniform, cookie-cutter tasks mandated by a one-size-fits-all corporate manual.[46]

Addressing whether Plaintiffs' claims could be tried fairly as a collective action also requires looking to the purposes of § 216(b) actions under the FLSA: (1) reducing the burden on plaintiffs through the pooling of resources, and (2) efficiently resolving common issues of law and fact that arise from the same illegal conduct. *See Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989) (noting a collective action affords plaintiffs the "advantage of lower individual costs to vindicate rights by the pooling of resources" and "[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact"). We also bear in mind that the FLSA is a remedial statute that should be liberally construed. *Prickett v. DeKalb County*, 349 F.3d 1294, 1296 (11th Cir. 2003) ("FLSA is a remedial statute that has been

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46. Just because a business classifies all employees in a particular job category as exempt does not mean that those employees are necessarily "similarly situated" for purposes of a 29 U.S.C. § 216(b) collective action. Rather, it is necessary to review the actual job duties of those in that job category to determine whether they are similarly situated and whether the exemption defense can be collectively litigated. Here, Family Dollar argues the store's size, sales volume, and location cause store managers' job duties to vary and preclude a collective trial. The facts—that Family Dollar never examined how store managers spent their time and that none of those factors had anything to do with Family Dollar's decision to exempt all store managers from overtime pay—counter Family Dollar's argument in that regard.

construed liberally to apply to the furthest reaches consistent with congressional direction." (quotation marks omitted)). Oddly, the thrust of Family Dollar's fairness argument butts up against the purpose of a collective action—to efficiently resolve a large number of plaintiffs' claims.[47] Therefore, generally speaking, the size of an FLSA collective action does not, on its own, compel the conclusion that a decision to collectively litigate a case is inherently unfair.

Furthermore, Family Dollar's decertification argument is, at root, a claim that the district court's subsequent use of representative testimony during the actual trial was inherently unfair. As discussed later, Family Dollar's representative-testimony assertion—that the district court allowed the jury to decide 1,424 claims based on the testimony of only seven named Plaintiffs—is not supported by the record. In any event,

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47. On appeal, Family Dollar does not contend it was denied a fair opportunity to present its statute of limitations defense. Family Dollar produced detailed records of each of the 1,424 Plaintiffs' employment dates. Since the date on which each Plaintiff joined this lawsuit is a matter of public record, the parties submitted charts showing the amount of back pay owed for each plaintiff for both a two-year and a three-year time period. Thus, once the jury decided the executive exemption issue in Plaintiffs' favor, the jury had the necessary evidence in chart form to limit Plaintiffs' back pay to either two or three years. This underscores how collective actions about overtime pay can be readily and fairly managed. Plus, this is not a case of borderline similarity among the Plaintiffs, but one of heightened similarity, which significantly adds to our fairness conclusion.

we examine the evidence before the court when it heard Family Dollar's motion to decertify. *See Haynes*, 696 F.2d at 887 ("Our review of that decision must be premised upon the evidence that was before the district court at that time."). We are persuaded that, before trial, fairness considerations militated in favor of allowing this overtime-pay action to proceed in a collective forum. Given the substantial similarity of the class members' jobs and uniform corporate treatment of the store managers, it would not serve the interest of judicial economy to require these overtime-pay claims to be adjudicated in 1,424 individual trials. Based on the record in this case, we cannot say the district court abused its discretion in denying Family Dollar's motion for decertification.

IV. EXECUTIVE EXEMPTION DEFENSE

A. FLSA's Executive Exemption

The FLSA requires that employers pay their employees time and a half for hours an employee works in excess of a 40-hour workweek. 29 U.S.C. § 207(a)(1); *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1156 (11th Cir. 2008); *Allen v. Bd. of Pub. Educ.*, 495 F.3d 1306, 1314 (11th Cir. 2007). But there are exemptions to this requirement. *Alvarez Perez*, 515 F.3d at 1156. The exemption at issue here, the executive exemption, provides that the FLSA's requirements "shall not apply with respect to . . . any employee employed in a bona fide executive . . . capacity." 29 U.S.C. § 213(a)(1).

Appendix A

The Department of Labor's ("DOL") regulations interpret this defense. Because Plaintiffs' claims span from 1999 until 2005, two sets of DOL regulations apply. The regulations that were in effect prior to August 23, 2004 (the "old regulations") contain a short test that defines the phrase "employee employed in a bona fide executive capacity."[48] 29 C.F.R. § 541.1 (2003) (ellipsis omitted). This short test has three requirements: (1) an employee "is compensated on a salary basis at a rate of not less than $250 per week," (2) his "primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized

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48. The old regulations had a long test and a short test. The long test applied to those who made not less than $155 a week. 29 C.F.R. § 541.1(a)-(f) (2003). The short test, on the other hand, applied to those making not less than $250 a week. 29 C.F.R. § 541.1(f) (2003). The entire test was contained in section (f), and it was therefore "short" in comparison to the longer test contained in § 541.1(a)-(f) (2003). *See Atlanta Prof'l Firefighters Union, Local 134 v. City of Atlanta*, 920 F.2d 800, 804-05 (11th Cir. 1991).

The current regulations (effective August 23, 2004) abolished the distinction between the long and short tests. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed.Reg. 22,122, 22,122-25 (Apr. 23, 2004) (codified at 29 C.F.R. pt. 541) (explaining reasons for the August 23, 2004 change). The Plaintiffs whose claims involve conduct that occurred prior to August 23, 2004 all earned more than $250 a week. Therefore, only the short test under the old regulations and the August 23, 2004 regulations apply to this case.

department or subdivision thereof," and (3) his work "includes the customary and regular direction of the work of two or more other employees." *Id.* (2003); *Rodriguez*, 518 F.3d at 1263; *Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823, 825 (11th Cir. 1988).[49]

After August 23, 2004, the new regulations apply and add a fourth requirement. To establish an employee is a bona fide executive, an employer must show: (1) the employee is "[c]ompensated on a salary basis at a rate of not less than $455 per week"; (2) the employee's "primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof"; (3) the employee "customarily and regularly directs the work of two or more other employees"; and (4) the employee "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 C.F.R. § 541.100(a) (2006).[50]

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49. We cite the pre-August 23, 2004 regulations with a 2003 citation and the post-August 23, 2004 ones with a 2006 citation.

50. The new regulations explain the determination of whether an employee's recommendations are given particular weight includes consideration of:

> whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and

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The parties agree that the first element of the executive exemption test—the amount of salary—is met. But they hotly dispute the second element—whether the store managers' primary duty is management. Thus, we examine the second element.

B. Primary Duty Is Management

Both regulations require that the employee's primary duty is management. The old regulations give these examples of managerial tasks:

> Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their

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> recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. . . . An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

29 C.F.R. § 541.105 (2006).

> complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

29 C.F.R. § 541.102(b) (2003).[51] The new regulations are similar and explain that generally, management includes, but is not limited to, the same conduct listed in the old regulations, but adds these examples of managerial tasks: "planning and controlling the budget; and monitoring or implementing legal compliance measures."[52] 29 C.F.R. § 541.102 (2006).

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51. While the new regulations elevate the employee's hiring and firing authority to a fourth, separate requirement, the old regulations likewise considered the selection of employees as a management task under the primary duty inquiry.

52. The new regulations list these management tasks:

> [I]nterviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees'

(Cont'd)

Appendix A

The old and new regulations do not define primary duty. Both indicate the answer to the primary duty question "must be based on all the facts in a particular case." 29 C.F.R. § 541.700(a) (2006); 29 C.F.R. § 541.103 (2003). Both regulations identify factors to consider when determining whether an employee's primary duty is managerial. *See* 29 C.F.R. § 541.700(a) (2006); 29 C.F.R. § 541.103 (2003).

The old regulations list these five factors: (1) "[t]he amount of time spent in the performance of the managerial duties"; (2) "the relative importance of the managerial duties as compared with other types of duties"; (3) "the frequency with which the employee exercises discretionary powers"; (4) "his relative

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> productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

29 C.F.R. § 541.102 (2006).

freedom from supervision"; and (5) "the relationship between [the employee's] salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor." 29 C.F.R. § 541.103 (2003); *see also Rodriguez*, 518 F.3d at 1264 (listing factors in § 541.103 to be analyzed in determining whether an employee's primary duty is management). The old regulations explain: "In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty." 29 C.F.R. § 541.103 (2003). The regulations then hedge a bit, and state that "[t]ime alone . . . is not the sole test. . . ." *Id.* (2003). Where the employee does not spend over 50% of his time on management, "he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion." *Id.* (2003).

The new regulations make a stronger effort to define primary duty, stating that "[t]he term 'primary duty' means the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a) (2006). The new regulations also add that this determination is to be made "with the major emphasis on the character of the employee's job as a whole." *Id.* (2006). The new regulations explicitly reference the same factors with one exception. The third factor—"the frequency with which the employee

exercises discretionary powers"—has been deleted.[53] *Compare id.* (2006), *with* 29 C.F.R. § 541.103 (2003).

The new regulations, like the old, expand upon the time-spent-on-exempt-work factor. The new regulations state that this factor "can be a useful guide in determining whether exempt work is the primary duty of an employee" and that "employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement." 29 C.F.R. § 541.700(b) (2006). As in the old ones, the new regulations specify that "[t]ime alone, however, is not the sole test" and thus "[e]mployees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion." *Id.* (2006).

The new regulations also clarify that "[c]oncurrent performance of exempt and nonexempt work does not

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53. The new regulations list these factors to consider for the primary duty inquiry:

> [T]he relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a) (2006).

disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met." *Id.* § 541.106(a) (2006). In other words, an employee's performance of nonexempt work does not preclude the exemption if the employee's primary duty remains management.[54] Similarly, an employee whose primary duty is to perform nonexempt work does not become exempt merely because she has some responsibility for occasionally directing the work of nonexempt employees.[55] "Whether an employee meets the

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54. The new regulations illustrate the concept of "concurrent duties":

> For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, *but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management.* An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

29 C.F.R. § 541.106(b) (2006) (emphasis added).

55. The new regulations illustrate this proposition through this example:

> [A] relief supervisor or working supervisor *whose primary duty is performing nonexempt work* on the

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requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis" and based on the factors already set forth in § 541.700(a) as to the primary duty question. *Id.* (2006).

We turn to Family Dollar's argument that the primary duty of its store managers is managerial, triggering the FLSA's executive exemption, and that the court erred in denying Family Dollar's motion for judgment as a matter of law.

C. Family Dollar's Motion for Judgment as a Matter of Law

Family Dollar bears the burden of proving its executive exemption affirmative defense. *Alvarez Perez*, 515 F.3d at 1156; *Brock*, 835 F.2d at 826. This Court has recognized the "Supreme Court's admonition that

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> production line in a manufacturing plant *does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when,* for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

29 C.F.R. § 541.106(c) (2006) (emphasis added).

courts closely circumscribe the FLSA's exceptions." *Nicholson v. World Bus. Network, Inc.*, 105 F.3d 1361, 1364 (11th Cir. 1997). And the exemption "is to be applied only to those clearly and unmistakably within the terms and spirit of the exemption." *Brock*, 835 F.2d at 826 (quotation marks omitted). Therefore, we narrowly construe exemptions to the FLSA overtime requirement. *Alvarez Perez*, 515 F.3d at 1156 (stating "exemptions are to be construed narrowly" (quotation marks omitted)); *Nicholson*, 105 F.3d at 1364.

We have rejected a "categorical approach" to deciding whether an employee is an exempt executive. *Rodriguez*, 518 F.3d at 1264. Instead, we have noted the "necessarily fact-intensive nature of the primary duty inquiry," that "the answer is in the details," and that "[w]here an issue turns on the particular facts and circumstances of a case, it is not unusual for there to be evidence on both sides of the question, with the result hanging in the balance." *Id.* And "[t]he result reached must be left intact if there is evidence from which the decision maker, the jury in this instance, reasonably could have resolved the matter the way it did." *Id.*

Here, the trial evidence was legally sufficient for a reasonable jury to find that Family Dollar failed to meet its burden of proving that its store managers' primary duty was management. Because that evidence is detailed

above, we do not recount it but focus on the factors in the primary duty inquiry.[56]

As to the time-spent-on-exempt-work factor, the overwhelming evidence at trial showed Plaintiff store managers spent 80 to 90% of their time performing nonexempt, manual labor, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms. Conversely, Plaintiff store managers spent only 10 to 20% of their time performing exempt work, a far cry from the DOL's 50% guideline for management tasks. *See* 29 C.F.R. § 541.700(b) (2006); 29 C.F.R. § 541.103 (2003). Family Dollar did not present evidence to the contrary. *See Allen*, 495 F.3d at 1315 ("The employer is in a superior position to know and produce the most probative facts concerning the nature and amount of work performed. . . ."). In fact, Family Dollar executives Barkus and Broome testified that Family Dollar never studied what store managers actually did on a day-to-day basis or the amount of time store managers spent on managerial duties.

We recognize that the amount of time spent performing exempt tasks is not dispositive of the

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56. Family Dollar does not argue that the old and new regulations lead to different results in the primary duty inquiry here. Thus, we need not distinguish between them in our analysis. Although *Rodriguez* was decided under the old regulations, 518 F.3d at 1262 n.2, its focus on the "fact-intensive nature of the primary duty inquiry" is correct under the new regulations too, *see* 29 C.F.R. § 541.700(a) (2006).

primary duty issue. But substantial evidence about the four other factors also supports the jury's verdict here.

As to the relative importance of store managers' managerial duties compared with their nonexempt duties, this factor weighs in favor of the jury's finding that store managers are not exempt executives. Admittedly, the store managers' job description includes managerial duties. But Family Dollar's job description of the store managers' "Essential Job Functions" provides that store managers must do the same work as stock clerks and cashiers. Store managers must work their store's preassigned merchandise delivery day, known as "truck day." Barkus acknowledged that store managers spent their delivery-day time doing manual labor. Rather than treat these manual tasks as an incidental part of a managerial job, Family Dollar describes them as essential. A large amount of manual labor by store managers was a key to Family Dollar's business model given each store's limited payroll budget and the large amount of manual labor that had to be performed. The jury was free to weigh the relative importance of the store managers' managerial and non-managerial duties, but ample evidence supported a finding that the non-managerial tasks not only consumed 90% of a store manager's time but were of equal or greater importance to a store's functioning and success.

The third factor in the old regulations—the frequency with which the employee exercises discretionary powers—

also supports the jury's verdict.[57] There was overwhelming evidence that store managers spent only 10 to 20% of their time on exempt (i.e., managerial) work. Plaintiffs presented evidence that store managers rarely exercised discretion because either the operations manuals or the district managers' directives controlled virtually every aspect of a store's day-to-day operations. The manuals and other corporate directives micro-managed the days and hours of store operations, the number of key sets for each store, who may possess the key sets, entire store layouts, the selection, presentation, and pricing of merchandise, promotions, payroll budgets, and staffing levels. The manuals even instruct store managers on the smallest details, such as how to arrange clip boards, what items go in each of the four drawers of the single file cabinet, and how to remove spots and chewing gum from store mats.

The few decisions not mandated by the manuals and corporate headquarters are vested in the district manager. These decisions include the power to change

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57. As noted above, the new regulations omit this discretionary-power factor, but they retain the freedom-from-supervision factor. Having discretionary power is one aspect of freedom from supervision. In addition, the new regulations specify that the determination of an employee's primary duty includes, but is not limited to, the listed factors and is to be made "with the major emphasis on the character of the employee's job as a whole." 29 C.F.R. § 541.700(a) (2006). Thus, the new regulations do not preclude, and are consistent with, our consideration of the frequency with which an employee exercises discretionary powers in our primary duty analysis.

store hours, close for bad weather, approve changes to store layouts, establish all employees' initial rates of pay, approve all pay raises, set payroll budgets, control the total labor hours allocated to each store, approve the hiring and firing of assistant managers, and even approve the use of appliances such as coffee pots. Even when a store manager exercised discretion in scheduling employees for the week, she did so within the strict constraints of mandatory store hours, a limited payroll budget, a prohibition on overtime work by hourly employees, and a staff scheduler. This evidence supports a reasonable jury finding that Family Dollar's store managers had few, and infrequently exercised, discretionary powers.

As to the store managers' relative freedom from supervision, this factor likewise favors Plaintiffs. The evidence showed that district managers (1) supervised 10 to 30 stores, (2) headed the store team, (3) were responsible for enforcing the detailed store operating policies, (4) closely reviewed each store's inventory orders and net sales figures, (5) closely monitored each store's weekly payroll, (6) controlled employee hourly rates and pay raises, (7) routinely sent to-do lists and emails with instructions to store managers, (8) closely supervised the selection, pricing, sales, displays, and ordering of merchandise, and (9) closely supervised every aspect of store operations. Store managers had little freedom from direct supervision. Indeed, ample evidence showed that the combination of sweeping corporate micro-management, close district manager oversight, and fixed payroll budgets left store managers

little choice in how to manage their stores and with the primary duty of performing manual, not managerial, tasks.[58]

As to the last factor—the relationship between the store managers' salary and other wages for nonexempt work—the parties submitted evidence documenting the store managers' average salaries and the assistant managers' average hourly wages from 1999 to 2005. Using a 70-hour workweek, store managers earned, on average, roughly the same (less than a dollar or more per hour) as hourly assistant managers. Using a 60-hour workweek, store managers earned approximately two or three dollars more per hour than hourly assistant managers. The jury was entitled to consider these salary figures, along with the fact that store managers performed nonexempt work 80 to 90% of the time. Given the relatively small difference between the store managers' and assistant managers' hourly rates, it was within the jury's province to conclude that this factor either did not weigh in Family Dollar's favor or at least did not outweigh the other factors in Plaintiffs' favor.

In sum, there was legally sufficient evidence for the jury, after considering all of the evidence and weighing

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58. Although Family Dollar emphasizes its store managers had management-type paperwork to do (such as bank deposits and accident and payroll reports), Family Dollar ignores that how to do each task was prescribed by the manual and district managers and store managers had little discretion, under Plaintiffs' evidence, as to those tasks.

the relevant factors,[59] to have reasonably determined that Family Dollar failed to meet its burden of proving that Plaintiff store managers' primary duty was management.

D. Other Circuits' Cases

Despite these factors, Family Dollar insists its store managers were "in charge" of the store, and therefore, exempt as a matter of law. Family Dollar cites several cases concluding that managers of a free-standing store or restaurant were exempt executives as a matter of law. However, the courts made that decision only after examining the factual details of the employees' duties and actual work. As we stated in *Rodriguez*, such a "particularized approach is consistent with the DOL regulation, which provides that the 'determination of whether an employee has management as his primary duty must be based on all the facts in a particular case.' " 518 F.3d at 1264 (quoting 29 C.F.R. § 541.103 (2002)); *see* 29 C.F.R. § 541.700(a) (2006) (stating the primary duty question "must be based on all the facts in a particular case"); 29 C.F.R. § 541.103 (2003) (same).

In answering the primary duty inquiry, courts do not "simply slap[] on a talismanic phrase." *Rodriguez*, 518 F.3d at 1264. Family Dollar's "in charge" label strikes us as a way to bypass a meaningful application of the fact-intensive factors. As in *Rodriguez*, we reject that "categorical approach." *Id.*

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59. The district court explicitly instructed the jury on these factors.

Moreover, Family Dollar's cases had materially dissimilar facts and did not involve the combination of (1) store managers performing as high a percentage of nonexempt work, (2) the same severe degree of restriction on store managers' discretion by corporate policy, and (3) oversight as strict and involved as district managers' in this case. For starters, none of the circuit cases dealt with store managers that spent 80 to 90% of the time performing manual labor. For example, in *Thomas v. Speedway SuperAmerica, LLC*, 506 F.3d 496, 499 (6th Cir. 2007), a store manager spent 60% of her time performing non-managerial duties.[60] *See also Baldwin v. Trailer Inns, Inc.*, 266 F.3d 1104, 1108-09, 1114 (9th Cir. 2001) (accepting on summary judgment plaintiffs' supported assertion they spent "more than fifty percent of the time" on nonexempt manual tasks but without providing a concrete figure).[61]

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60. Importantly, the Sixth Circuit noted that courts cannot rely solely on whether an employee was "in charge" of the store. *Thomas*, 506 F.3d at 503. Rather, they must evaluate the employee's actual job duties. *Id.* The court did "not adopt a rule that any employee who is in charge of a store has management as her primary duty; [it] merely conclude[d] that other cases stating as much do not conflict with [Sixth Circuit] precedent." *Id.* at 503 n.4. "When a court is asked to consider whether an employee's primary duty consists of management, the proper analytical approach is to scrutinize the factors in the Secretary's regulations, not simply to determine whether the employee was 'in charge.' " *Id.*

61. The *Baldwin* decision also rests on other materially dissimilar facts. *See Baldwin*, 266 F.3d at 1108-09, 1115 (stating

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Family Dollar's cases are also distinguishable in that they give less weight to the plaintiffs' estimates of time spent performing nonexempt work because the plaintiffs in those cases performed exempt and nonexempt work concurrently. *See Thomas*, 506 F.3d at 504; *Donovan v. Burger King Corp.* ("*Burger King I*"), 672 F.2d 221, 226 (1st Cir. 1982); *Baldwin*, 266 F.3d at 1114. The evidence, in the light most favorable to the Plaintiffs here, did not show they performed managerial and non-managerial tasks concurrently. Rather, there was evidence that, by and large, the store managers performed most managerial tasks before the store opened and after it closed. The amount of manual labor overwhelmed their capacity to perform managerial duties concurrently during store hours. Other evidence showed the nature of the manual labor prevented store managers from performing managerial duties concurrently. For example, a store manager unloading a truck and

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plaintiffs "had to adhere to company policies" but describing plaintiffs as "free from daily supervision," noting that supervisor "visited the park once or twice a month, and there was no constant oversight," and that "in practice, the oversight was neither so rigorous nor so frequent as to undermine the undeniable fact that the Baldwins were substantially free from supervision"). Further, the *Baldwin* plaintiffs managed without much interference by their corporate headquarters. *Id.* at 1115 ("They managed the park without much participation or interference from Trailer Inns, Inc.'s Yakima headquarters."). As noted in *Rodriguez*, *Baldwin* "illustrates the necessarily fact-intensive nature of the primary duty inquiry." *Rodriguez*, 518 F.3d at 1264.

stocking the storeroom was not concurrently supervising the cashier out front. The jury may well have given more weight to the Plaintiffs' evidence that they spent 80 to 90% of their time solely on nonexempt work.

Even the retail-chain cases with standardized instructions did not involve fact patterns with the same level of corporate directives or district managers that constrained the powers of the employees-in-question in quite the same way. For example, in *Burger King I*, 672 F.2d at 223, and *Donovan v. Burger King Corp.* ("*Burger King II*"), 675 F.2d 516, 517, 521-22 (2d Cir. 1982), the assistant managers retained discretion over a number of operational decisions, and nothing suggested the Burger King restaurant manager, the position directly above the assistant manager, had oversight powers comparable to the ones exercised by Family Dollar district managers. The Second Circuit described restaurant managers as "available by phone" and "available for advice"—not as overarching remote micro-managers. *See Burger King II*, 675 F.2d at 522. Likewise, in *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 616 (8th Cir. 1991), the court's description of regional-manager control pales in comparison to the rigid directives and supervision that Plaintiffs presented at trial. *Id.* For Family Dollar store managers, there was evidence that showed district managers and corporate headquarters made the vast majority of day-to-day decisions, and store managers had little discretion.

In any event, our affirmance of the jury's verdict here is based on a fact-intensive application of the factors espoused in the regulations, and not on a categorical approach of whether a particular employee is "in charge." More importantly, while there was "evidence on both sides of the question," the "jury[,] in this instance, reasonably could have resolved the matter the way it did." *Rodriguez*, 518 F.3d at 1264. "The issue is not whether the evidence was sufficient for [Family Dollar] to have won, but whether the evidence was sufficient for it to have lost. It was." *Id.* at 1264-65.[62]

E. 163 Individual Plaintiffs Granted Judgment on Executive Exemption Defense

Family Dollar also appeals the district court's decision to grant judgment on the executive exemption defense as a matter of law to 163 of the 1,424 individual Plaintiffs. The court concluded that Family Dollar failed to prove these 163 Plaintiffs satisfied the third part of

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62. Family Dollar stresses that its store managers either hired and fired the hourly employees, or had district managers who frequently followed their hiring and firing recommendations. Hiring and firing authority is now a fourth, separate requirement in the executive exemption test; even if met, Family Dollar still has to establish the store managers' primary duty was management. 29 C.F.R. § 541.100(a) (2006); 29 C.F.R. § 541.1 (2003). While this is certainly a fact the jury could also consider in making that primary duty determination, the jury was required to base its decision on all the facts and was not bound to find the store managers' primary duty was management due to this authority over hourly employees.

the executive exemption test, i.e., that they customarily and regularly directed the work of two or more other employees. 29 C.F.R. § 541.100(a) (2006) (identifying third part of executive exemption test as whether the employee "customarily and regularly directs the work of two or more other employees"); 29 C.F.R. § 541.1 (2003) (requiring that an exempt employee's work "includes the customary and regular direction of the work of two or more other employees"). As we explain below, Family Dollar has shown no reversible error on this issue.

Both regulations provide that customarily and regularly means a frequency that "must be greater than occasional but which, of course, may be less than constant."[63] 29 C.F.R. § 541.701 (2006); 29 C.F.R. § 541.107(b) (2003). The new regulations add that "[t]asks or work performed 'customarily and regularly' includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks." 29 C.F.R. § 541.701 (2006).

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63. The old regulations did not define "customary and regular" in the short test for the executive exemption. However, the long test under the old regulations did define the phrase "customarily and regularly," albeit with regard to the long test's separate requirement that an exempt executive "customarily and regularly exercises discretionary powers" in 29 C.F.R. § 541.1(d) (2003). It provided that "customarily and regularly" is "a frequency which must be greater than occasional but which, of course, may be less than constant." 29 C.F.R. § 541.107(b) (2003). Family Dollar cites § 541.107 as a useful definition of "customary and regular."

Both regulations define "two or more other employees" as either two full-time workers or their equivalent. 29 C.F.R. § 541.104(a) (2006); 29 C.F.R. § 541.105(a) (2003). As to equivalency, an employee may supervise one full-time employee and two part-time employees. *See* 29 C.F.R. § 541.105(a) (2003). "For example, if the 'executive' supervises one full-time and two part-time employees of whom one works morning[s] and one, afternoons; or four part-time employees, two of whom work mornings and two afternoons, this requirement would be met." *Id.* The new regulations express the same sentiment. *See* 29 C.F.R. § 541.104(a) (2006) ("One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent."). However, neither set of regulations defines "full-time."

To prove its store managers customarily and regularly directed the work of two or more employees, Family Dollar introduced payroll records and easy-to-digest exhibits summarizing that data. For example, Exhibit 1742C provided data about each of the 1,424 Plaintiffs including (1) their full names, (2) social security numbers, (3) the number of weeks each worked as a store manager (under a row heading entitled "# weeks supervised"), (4) the number of weeks each store manager had two or more full-time hourly employees working in the store, and (5) what percentage of time each store manager had two or more full-time hourly employees. Exhibit 1742C assumed that a full-time employee works 40 hours a week and that full-time

meant 80 hours of employee work per week through any combination of employees.[64]

In applying the requirement that an employee "customarily and regularly directs the work of two or more other employees," the district court examined whether store managers supervised 80 subordinate hours of employee work per week at least 80% of the time. The district court did not require the store managers to be present when hourly employees worked those 80 hours—only that the store employ 80 hours of subordinate employee labor 80% of the time. Using Family Dollar's Exhibit 1742C, the district court granted judgment as a matter of law to 163 salaried Plaintiff store managers whose stores did not meet that requirement.

Family Dollar argues the court should have used Family Dollar's internal definition of full-time as a 30-hour workweek. Although the preamble to the new regulations states that the DOL declines to clarify the meaning of "full-time," it "stands by its current interpretation that an exempt supervisor generally must direct a total of 80 employee-hours of work each week."[65] Defining and Delimiting the Exemptions for

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64. To be clear, Family Dollar also submitted other exhibits. But the others assumed that a full-time employee worked a 30-hour workweek (Exhibit 1742A) or a 35-hour workweek (Exhibit 1742B). The district court used Exhibit 1742C (based on a 40-hour workweek), which is why we focus on that exhibit.

65. The DOL Wage and Hour Division's Field Operations Handbook similarly states that "[t]wo full-time employees or (Cont'd)

Executive, Administrative, Professional, Outside Sales and Computer Employees, 69 Fed.Reg. 22,122, 22,135 (Apr. 23, 2004). The preamble also states that "circumstances might justify lower standards. For example, firms in some industries have standard workweeks of 37 ½ hours or 35 hours for their full-time employees. In such cases, supervision of employees working a total of 70 or 75 hours in a workweek will constitute the equivalent of two full-time employees." *Id.*

Notably, the preamble does not suggest a workweek as short as 30 hours counts as "full-time" under the FLSA, much less 60 labor hours substituting for 80 hours. Further, Family Dollar's brief points to no evidence in the trial record suggesting that the industry standard in its line of retail business is a 30-hour workweek. While there may be instances where a deviation from the 40-hour workweek is appropriate, we cannot say that the district court, based on this record, erred in adopting 80 hours as constituting two full-time employees or their equivalent in this case.

Although Family Dollar also criticizes the 80% threshold, Family Dollar does not argue that the court's

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the equivalent within the meaning of Reg. 541.105(a) is generally considered to mean 80 hours of work by subordinate employees." Field Operations Handbook, § 22c00(b). This Court has noted that the DOL's Field Operations Handbook is persuasive, even though it is not entitled to *Chevron* deference. *Klinedinst v. Swift Invs., Inc.*, 260 F.3d 1251, 1255 (11th Cir. 2001).

effort to quantify the customary-regular requirement as a percentage of time was error or that the customary-regular issue should have gone to the jury. Rather, Family Dollar primarily challenges the district court's last step in the calculation of whether Plaintiffs met the 80% threshold. As we noted above, the district court authorized Family Dollar to count every week that the stores in question had 80 labor hours worked by the hourly employees, and it did not require the store managers to be physically present at the store during those 80 hours for those weeks to count towards the 80% mark.[66] Family Dollar does not challenge that part of the calculation.[67] Nor does it challenge the accuracy of the calculation as to the number of weeks each salaried store manager worked, the number of weeks hourly

66. In fact, Plaintiffs challenged Family Dollar's exhibits in part on the grounds that Family Dollar's calculation of the total employee hours failed to account for whether the store managers were physically present at the store at the same time as their subordinates. In other words, even where store managers were absent, Family Dollar still counted all subordinate labor hours for the purpose of their exhibits on the customary and regular supervision issue. The district court rejected the Plaintiffs' challenge.

Therefore, Family Dollar benefited from every subordinate hour worked—without regard to whether the store managers were physically present or on vacation, out sick, on leave, or just not there.

67. Indeed, at Family Dollar's request, the district court instructed the jury that "[c]ontinuous physical presence is not an essential requirement for supervision."

employees worked, or the percentage of time each individual store manager directed the work of two or more full-time employees or their equivalent. Indeed, the data are from Family Dollar's own Exhibit 1742C. The calculations showed, for example, that 589 stores had 80 labor hours 100% of the time, and 290 more stores had 80 labor hours 90% of the time. But Exhibit 1742C also showed that 163 stores had 80 labor hours less than 80% of the time in their stores (and of those, some were well below 50% and several at 0%).

Family Dollar contends that the court should have used the average percentage of all 1,424 store managers as a group. In other words, its argument is that, on average, store managers (as a group) had 80 labor hours in their stores 93% of the time. Family Dollar arrives at this conclusion by dividing the number of weeks that Plaintiffs supervised two or more employees for 80 hours (61,481) by the total number of weeks that Plaintiffs worked at Family Dollar (66,097). The total percentage: 93%. While averaging the number of weeks that employees meet the criteria may suffice in some collective cases, the court here enjoyed more precise data that showed (1) the percentage for each of the 1,424 store managers individually and (2) that 163 of the Plaintiffs failed to supervise two or more employees 80% of the time. Family Dollar cites no authority, and presents us with no principled basis, for determining that the court's use of this more precise evidence was reversible error.

The parties cite two other circuit court cases addressing this issue. In *Secretary of Labor v. Daylight Dairy Prods., Inc.*, the First Circuit concluded that employees who do not direct work 76% of the time "fall[ ] short" of "regular and customary" supervision of 80 hours of work. 779 F.2d 784, 788 (1st Cir. 1985). Although *Daylight Dairy* failed to decide what precise figure constitutes customary and regular direction, it determined that 76% was insufficient. In the Eighth Circuit's *Murray* decision, the "store managers supervised at least two or more employees who worked eighty hours per week 98.2% of the time." 50 F.3d at 567-68. The Eighth Circuit concluded: "That is 'customarily and regularly' by any definition." *Id.* Although the court expressed its disagreement with *Daylight Dairy, id.* at 568, it similarly failed to define a minimum threshold of precisely what "customary and regular" means.

We likewise do not draw a bright-line rule but examine only whether Family Dollar has shown reversible error in the court's use of Family Dollar's Exhibit 1742C as a basis for granting judgment in favor of the 163 Plaintiff store managers. It has not.

V. REPRESENTATIVE TESTIMONY

Family Dollar's challenge to the use of representative testimony proceeds as follows: Seven Plaintiffs testified. There are 1,424 Plaintiffs. Therefore, the verdict is based on only the representative testimony of less than 1% of the total number of Plaintiffs. Family

Dollar argues that this was simply too small a sample size of testifying Plaintiffs, and therefore the jury verdict is unreliable and should be set aside.

Family Dollar's depiction of the trial is belied by the record. First, Plaintiffs did not use representative testimony to prove its prima facie case. Instead, Plaintiffs relied on Family Dollar's thorough payroll records for each of the 1,424 Plaintiffs to show (1) when each employee worked, (2) how many actual hours they worked, (3) how much they were paid, and (4) that they never received overtime pay. Rather than contesting Plaintiffs' prima facie case,[68] Family Dollar focused on its executive exemption defense at trial.

Second, Family Dollar's claim, stripped of its hyperbole, is reduced to an objection that not enough Plaintiffs testified to ensure a reliable verdict on whether the executive exemption defense applied. But the jury's verdict as to that defense was not based on the testimony of just seven Plaintiffs. Instead, the parties presented an abundance of trial evidence about the executive exemption issue, including (1) a vast array of corporate manuals; (2) testimony from 39 witnesses including Family Dollar executives, district managers who ran the operations of 134 stores, and store

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68. To establish its prima facie case, Plaintiffs demonstrated that: (1) Family Dollar employed them; (2) Family Dollar is an enterprise engaged in interstate commerce covered by the FLSA; (3) each Plaintiff actually worked in excess of a 40-hour workweek; and (4) Family Dollar did not pay any overtime wages to them. *See* 29 U.S.C. § 207(a).

managers who worked at a total of 50 different stores; (3) detailed charts summarizing wages and hours; and (4) a wealth of exhibits including emails, internal Family Dollar correspondence, payroll budgets, and in-store schematics. If one factors in that Broome and Barkus oversaw thousands of stores, the witnesses go from representing hundreds of stores to thousands. In addition to the large quantity of testimonial evidence, the non-testimonial evidence was equally high in quality and largely comprised of Family Dollar's corporate records. The jury's verdict is well-supported not simply by "representative testimony," but rather by a volume of good old-fashioned direct evidence.[69]

Family Dollar's trial conduct is also revealing. It actually opposed the introduction of more witness testimony from Plaintiff store managers. After Family Dollar presented the deposition testimony of 12 opt-in store managers, Plaintiffs attempted to introduce into evidence the deposition testimony of 238 more opt-in

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69. It appears that the district court required the Plaintiffs, as part of their case-in-chief, to put up their rebuttal to Family Dollar's executive exemption defense before Family Dollar itself called any witnesses. Even so, the Plaintiffs presented more evidence as to the executive exemption in their case-in-chief than just the seven testifying Plaintiffs. And in any event, Plaintiffs established their prima facie case, and the executive exemption is Family Dollar's affirmative defense—not a part of Plaintiffs' case-in-chief. Thus, we view the evidence on the executive exemption defense as a whole.

store managers. But Family Dollar objected,[70] and the

70. MR. ST. CLAIR [for Family Dollar]: We had our extracts, Your Honor. They offered and testified the balance of those depositions. We're now talking about something completely different, depositions for which we haven't offered anything into evidence.

MR. JOHNSON [for Plaintiffs]: That goes to balance.

MR. ST. CLAIR: If it was just a party, it would be like I take my own deposition and put it in at trial. We can't do that. I might also add—

MR. R. WIGGINS [for Plaintiffs]: They wanted to take 250 depositions, Your Honor, of the collective group. You allowed them to take 250. They now have offered, I'm told, twelve. And we're offering the other, I guess, 238.

THE COURT: And you're offering them for the truth of the matter asserted?

MR. R. WIGGINS: Yes, as sworn testimony under the rules. Yes.

MR. JOHNSON: Yes.

THE COURT: And you—and you've not sought a stipulation as to what these witnesses would say, if called?

MR. R. WIGGINS: During the earlier part of the case, Judge, we could not come to an agreement about stipulations on that.

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district court sustained the objection.[71] Family Dollar cannot validly complain about the number of testifying plaintiffs when it successfully objected to Plaintiffs' attempt to present the testimony of almost 20 times as many Plaintiff store managers. Although Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own

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> MR. ST. CLAIR: Your Honor, this is the first time that I've heard anything about them offering depositions in this case from people who were not called as witnesses. This is the very first time that issue has been raised, Your Honor.
>
> MR. R. WIGGINS: It's not true, and it's mainly because he just entered the case recently, Your Honor. These are on our exhibit list. These—and there's nothing surprising about it. We've argued this before, it's just not—it's no surprise to them. We've always said, if you offer part of 250, we're going to offer the other part.
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> MR. ST. CLAIR: And, Your Honor, I'm told, at the pretrial conference said they will not be admitted into evidence. I wasn't at the pretrial conference, but my partner was.
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> THE COURT: Well, Plaintiffs' Exhibit 297 as offered by the plaintiff is not received in evidence, but it will be a part of the record. Any other evidence from either party?

71. Although Plaintiffs' offer of the deposition testimony was not received in evidence, the court ruled that it would "be a part of the record."

district managers, it chose not to. Indeed, Family Dollar used only 10 of its allotted 40 hours for its defense, even though it bore the burden of proving the executive exemption defense.[72]

This leads us to a third flaw in Family Dollar's argument. Plaintiffs did not shoulder the burden of proof on the executive exemption defense. Family Dollar did. *See Atlanta Prof'l Firefighters Union*, 920 F.2d at 804. Thus, Family Dollar cannot rely on an insufficient number of witnesses being called by the Plaintiffs to meet Family Dollar's burden of proof on its own affirmative defense.

Fourth, Family Dollar relies on two FLSA decisions involving representative testimony, but they do not help Family Dollar. *See Reich v. S. Md. Hosp., Inc.*, 43 F.3d 949, 951-52 (4th Cir. 1995); *Sec'y of Labor v. DeSisto*, 929 F.2d 789, 792-96 (1st Cir. 1991). Since these cases are part of a line of circuit cases dating back to *Anderson v. Mount Clemens Pottery*, 328 U.S. 680, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946),[73] a few words about *Mt. Clemens* are in order first.

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72. Family Dollar's cross-examination of Plaintiffs' witnesses did not count against its 40 hours unless its cross-examination time exceeded that of Plaintiffs' direct-examination. There is no indication in the briefs that Family Dollar's cross-examination reduced any of its 40 hours.

73. Congress abrogated a portion of the *Mt. Clemens* opinion not relevant here with the passage of the Portal-to-Portal Act, Pub.L. No. 49-52, 61 Stat. 87 (1947). *See* 29 U.S.C. § 251; *United States v. Cook*, 795 F.2d 987, 990-91 (Fed.Cir. 1986).

Appendix A

In *Mt. Clemens,* the Supreme Court authorized a burden-shifting scheme designed to facilitate the ability of plaintiffs to prove an FLSA violation where the employer failed to maintain proper records (such as how many hours its employees worked and the amount of pay). *Id.* at 686-88, 66 S.Ct. at 1192. To prevent workers from being penalized by the employer's failure to keep adequate records, the Supreme Court provided that plaintiffs could meet their burden of proof so long as they "prove[ ] that [they have] in fact performed work for which [they were] improperly compensated" and "produce [ ] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." *Id.* at 687, 66 S.Ct. at 1192. Although *Mt. Clemens* never used the term "representative testimony," subsequent courts have interpreted it to authorize some employees to testify about the number of hours they worked and how much they were paid so that other non-testifying plaintiffs could show the same thing by inference. *See, e.g., Reich,* 43 F.3d at 951 ("Under *Mt. Clemens,* the Secretary can present testimony from representative employees as part of his proof of the prima facie case."); *Donovan,* 780 F.2d at 1116 ("There is no requirement that to establish a *Mt. Clemens* pattern or practice, testimony must refer to all nontestifying employees. Such a requirement would thwart the purposes of the sort of representational testimony clearly contemplated by *Mt. Clemens.*"); *DeSisto,* 929 F.2d at 792 (interpreting *Mt. Clemens* burden-shifting and noting that the plaintiff "can rely on testimony and evidence from representative employees to meet the initial burden of

proof requirement"); *McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988) ("We hold that the *Mt. Clemens Pottery* standard allows district courts to award back wages under the FLSA to non-testifying employees based upon the fairly representative testimony of other employees.").

As a result, most of the circuit cases addressing how many FLSA plaintiffs need to testify before their testimony can be considered representative of the group involve an employer's failure to keep adequate records and the plaintiffs' use of the *Mt. Clemens* burden-shifting scheme. *See, e.g., McLaughlin*, 850 F.2d at 589; *Donovan v. Bel-Loc Diner, Inc.*, 780 F.2d 1113, 1115-16 (4th Cir. 1985), *disapproved of on other grounds, McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 108 S.Ct. 1677, 100 L.Ed.2d 115 (1988); *Brennan v. Gen. Motors Acceptance Corp.*, 482 F.2d 825, 829 (5th Cir. 1973). Family Dollar relies on two of these kinds of cases to support its argument that, statistically, not enough plaintiffs testified here. *See Reich*, 43 F.3d at 951-52 (reversing district court because testimony from 58 employees was insufficient to represent 3,368 employees); *DeSisto*, 929 F.2d at 792-96 (reversing district court for allowing one employee to represent 244 employees at trial).

This line of cases does not help Family Dollar. Here, Family Dollar adequately maintained its records. Indeed, Plaintiffs relied on those records extensively. Therefore, the *Mt. Clemens* burden-shifting analysis does not apply. Furthermore, the question in these burden-shifting

cases is whether the plaintiffs showed the amount and extent of the work performed as a matter of just and reasonable inference. In such a context, it makes sense to examine whether there is, statistically speaking, enough evidence to support the inference, and to shift the burden of proof on an element of the plaintiffs' case (the number of hours worked) to the employer. *See DeSisto*, 929 F.2d at 794 ("The evidence was simply inadequate to give rise to a 'just and reasonable inference' as to the amount and extent of undercompensated work."). Where employer payroll records are inadequate, litigants can only approximate the number of hours worked and the amount of pay due. In such cases, the answer requires a numerical estimate of hours and pay.

In contrast, the Plaintiffs here relied on Family Dollar's extensive payroll records that broke down, week-by-week, how many hours each of the 1,424 store managers worked. *Reich* and *DeSisto* are nothing like this case. Here, there was no need for such numerical approximation.

If anything, the *Mt. Clemens* line of cases affirms the general rule that not all employees have to testify to prove overtime violations. *See DeSisto*, 929 F.2d at 793 (indicating that, generally speaking, employees who perform "substantially similar work" may testify on behalf of their counterparts); *Reich v. S. New England Telecomms. Corp.*, 121 F.3d 58, 63 (2d Cir. 1997) (stating "there is no bright line formulation that mandates reversal when the sample is below a percentage

threshold. It is axiomatic that the weight to be accorded evidence is a function not of quantity but of quality."); *see also Brock v. Norman's Country Mkt., Inc.*, 835 F.2d 823, 828 (11th Cir. 1988) ("[I]t is clear that each employee need not testify in order to make out a prima facie case of the number of hours worked as a matter of 'just and reasonable inference.' ") (quoting *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 472 (11th Cir. 1982)).[74]

We reject Family Dollar's argument that the executive exemption defense is so individualized that the testifying Plaintiffs did not fairly represent the non-testifying Plaintiffs. For the same reasons that the court did not err in determining that the Plaintiffs were similarly situated enough to maintain a collective action, it did not err in determining that the Plaintiffs were similarly situated enough to testify as representatives of one another.

In any event, the only issue we must squarely decide is whether there was legally sufficient evidence—representative, direct, circumstantial, in-person, by deposition, or otherwise—to produce a reliable and just verdict. There was.

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74. Even in non-*Mt. Clemens*-type cases, courts have authorized representative testimony in FLSA cases. *See, e.g., Burger King I*, 672 F.2d at 225 (authorizing district court to rely on representative testimony in FLSA case to prevent cumulative testimony); *Dole v. Snell*, 875 F.2d 802 (10th Cir. 1989).

VI. WILLFULNESS AND LIQUIDATED DAMAGES

Family Dollar also appeals (1) the sufficiency of the evidence to support the jury's finding that Family Dollar willfully violated the FLSA, a decision that extended the statute of limitations from two to three years, and (2) the court's reliance on the jury's willfulness finding in determining that Family Dollar did not act in good faith, a decision that triggered the liquidated damages award.

A. Willful Violation

The statute of limitations for a claim seeking unpaid overtime wages under the FLSA is generally two years. 29 U.S.C. § 255(a). But if the claim is one "arising out of a willful violation," the statute of limitations is extended to three years. *Id.*

"To establish that the violation of the [FLSA] was willful in order to extend the limitations period, the employee must prove by a preponderance of the evidence that his employer either knew that its conduct was prohibited by the statute or showed reckless disregard about whether it was." *Alvarez Perez*, 515 F.3d at 1162-63 (citing *McLaughlin*, 486 U.S. at 133, 108 S.Ct. at 1681). Federal regulations define "reckless disregard" as the " 'failure to make adequate inquiry into whether conduct is in compliance with the [FLSA].' " *Id.* at 1163 (quoting 5 C.F.R. § 551.104).

Family Dollar raises several challenges to the jury's willfulness finding. All fail. First, the evidence, detailed above, was legally sufficient to support the jury's finding that Family Dollar's FLSA violations were willful. For example, the Plaintiffs presented testimony from Family Dollar executives that it never studied whether the store managers were exempt executives. Executives also testified that Family Dollar's company-wide policy was that store managers were exempt from FLSA overtime requirements, but they had no idea who made that policy. Further, given the evidence at trial, the jury reasonably could have found that Family Dollar executives knew that store managers spent most of their time performing manual, not managerial, tasks, that corporate manuals micro-managed store managers' performance of those tasks, that the 380 district managers closely supervised their store managers, and that store managers had little discretion or freedom from supervision.

Second, we reject Family Dollar's suggestion that the complex and fact-intensive nature of the executive exemption inquiry means that, as a matter of law, the FLSA violations were not willful. Such a rationale would effectively preclude a willfulness finding in cases involving an executive exemption affirmative defense. While the jury could have well considered that factor in its willfulness determination, complexity alone does not preclude a willfulness finding.

Third, we reject Family Dollar's argument that the court's decision to grant judgment as a matter of law for 163 Plaintiffs somehow biased the jury in its

willfulness determination. This speculation has no support in the record. One could just as easily speculate in the other direction—the judgment for the 163 Plaintiffs meant the court thought the other 1,261 Plaintiffs failed to prove their case. Furthermore, the record shows the court instructed the jury that it still had to decide whether Family Dollar acted willfully and to determine damages for the 163 Plaintiffs. The court also instructed the jury to determine whether Family Dollar met its burden of proof on the executive exemption for the remaining Plaintiffs and, if so, to determine willfulness and damages.

Finally, Family Dollar has not shown the district court abused its discretion[75] in excluding various exhibits.[76] Based on our review of the record, the district court carefully considered whether to admit these exhibits and made specific findings and rulings under Federal Rule of Evidence 403. During the first trial in

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75. We review a district court's rulings on the admissibility of evidence for abuse of discretion and will reverse only if the moving party establishes a substantial prejudicial effect. *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1276 (11th Cir. 2008).

76. Family Dollar focuses mainly on these exhibits: (1) a district court decision (Exhibit 1955) and a magistrate judge decision (Exhibit 1954), both finding that a store manager was exempt from the FLSA's requirements; (2) correspondence to and from DOL Wage and Hour investigators (Exhibits 2249 and 2336) and state investigators (Exhibits 2356, 2357, and 2249); and (3) a report from two psychologists.

2005, the district court found that the vast bulk of this evidence was irrelevant. The district court also made a Rule 403 determination that even if there was some probative value in the evidence (although it emphasized that there was not), any such value was substantially outweighed by the other Rule 403 considerations.[77] In the second trial, the district court relied on these factual determinations and evidentiary rulings from the first trial.

Family Dollar's brief cites and describes the relevant exhibits. However, it fails to discuss Rule 403, to engage the court's reason for excluding these exhibits, or to explain why the court's particular findings and rulings were an abuse of its discretion. *See Flanigan's Enters., Inc. v. Fulton County,* 242 F.3d 976, 987 n.16 (11th Cir. 2001) (stating that argument was waived because the appellants "fail[ed] to elaborate or provide any citation of authority in support of" the argument in their brief). Family Dollar simply asserts that the court "excluded Family Dollar's evidence from the jury." In addition, Family Dollar fails to respond to the Plaintiffs' arguments that many of these exhibits were unauthenticated, and that no evidence showed that Family Dollar's decision-makers ever saw, or relied on, any of the documents when deciding to exempt the store

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77. Federal Rule of Evidence 403 authorizes district courts to exclude evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

managers. Viewing the record as a whole and bearing in mind the court's wide discretion in evidentiary rulings, Family Dollar has not carried its burden to show that the court abused its discretion or that the jury's willfulness determination was based on reversible error.

B. Good Faith and Liquidated Damages

When the jury finds an employer has violated the FLSA and assesses compensatory damages, the district court generally must add an award of liquidated damages in an equal amount. 29 U.S.C. § 216(b) ("Any employer who violates the provisions of . . . section 207 of this title shall be liable to the employee or employees affected in the amount of . . . their unpaid overtime compensation . . . and in an additional equal amount as liquidated damages."); *Alvarez Perez*, 515 F.3d at 1163. However, the district court has discretion to reduce or deny liquidated damages " 'if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA].' "[78] *Alvarez Perez*, 515 F.3d at 1163 (quoting 29 U.S.C. § 260).

"[T]he judge and jury answer what is essentially the same question for two different purposes. The

78. "The employer bears the burden of establishing both the subjective and objective components of that good faith defense against liquidated damages." *Alvarez Perez*, 515 F.3d at 1163; *Dybach v. State of Fla. Dep't of Corr.*, 942 F.2d 1562, 1566-67 (11th Cir. 1991).

willfulness or good faith question is answered first by the jury to determine the period of limitations and then, if there is a verdict for the employee, again by the judge to determine whether to award liquidated damages." *Id.* at 1162.

Here, the district court determined that Family Dollar failed to meet its burden of proving good faith on the liquidated damages issue because the jury already had found willfulness on the statute of limitations issue. Family Dollar argues that the district court erred because judges have the discretion to decide good faith regardless of the jury's willfulness finding.

While this was an open question in our circuit in 2006—the time of the second trial—our subsequent decision in *Alvarez Perez* forecloses Family Dollar's argument. In *Alvarez Perez,* we concluded that "in an FLSA case a jury's finding in deciding the limitations period question that the employer acted willfully precludes the court from finding that the employer acted in good faith when it decides the liquidated damages question."[79] 515 F.3d at 1166. Thus, under

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79. In *Alvarez Perez,* we explained this conclusion, in part, this way:

> [W]hen a jury finds that a defendant's violation is willful for statute of limitations purposes, it has already factored the possibility of good faith into its examination. . . . Not only would a district court impermissively be making a finding contrary to the

(Cont'd)

Alvarez Perez, the district court did not err in concluding that the jury's finding of willfulness precluded a good faith finding. *Id.* at 1165-66. Accordingly, the district court did not err in awarding Plaintiffs $17,788,029.32 in liquidated damages, representing an amount equal to the back pay award.[80]

VII. JURY INSTRUCTIONS

Family Dollar's last claim involves the district court's jury instructions. We start with our standard of review. Although "[w]e review jury instructions *de novo* to determine whether they misstate the law or mislead the jury to the prejudice of the party who objects to them," *United States v. Campa*, 529 F.3d 980, 992 (11th Cir. 2008) (citing *United States v. Grigsby*, 111 F.3d 806, 814 (11th

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(Cont'd)

> jury's findings, but . . . to find "good faith" after a finding of "willful" violation is illogical; the two terms are now mutually exclusive.

Alvarez Perez, 515 F.3d at 1165 (quotation marks omitted).

80. This Court recognized in *Alvarez Perez* that, in light of its holding, "evidence that an employer acted without willfulness and in good faith makes a difference at this stage only if that evidence compels judgment as a matter of law for the employer." *Id.* at 1167. Based on the Plaintiffs' evidence discussed above in the analysis of the jury's willfulness finding, we cannot say that Family Dollar's evidence compelled judgment as a matter of the law in its favor on willfulness and, in turn, on good faith.

Cir. 1997)), the standard is "deferential," *Bateman v. Mnemonics, Inc.*, 79 F.3d 1532, 1543 (11th Cir. 1996). As long as the instructions accurately reflect the law, the district court is afforded "wide discretion as to the style and wording employed in the instructions." *Bateman*, 79 F.3d at 1543 (quotation marks omitted); *Campa*, 529 F.3d at 992; *Bogle v. McClure*, 332 F.3d 1347, 1356 (11th Cir. 2003).

Our practice is not to nitpick the instructions for minor defects. "[I]f the jury charge as a whole correctly instructs the jury, even if it is technically imperfect, no reversible error has been committed." *Bateman*, 79 F.3d at 1543. "[W]e examine the challenged instructions as part of the entire charge, in view of the allegations of the complaint, the evidence presented, and the arguments of counsel, to determine whether the jury was misled and whether the jury understood the issues." *Iervolino v. Delta Air Lines, Inc.*, 796 F.2d 1408, 1413 (11th Cir. 1986) (citation and quotation marks omitted). "When the instructions, taken together, properly express the law applicable to the case, there is no error even though an isolated clause may be inaccurate, ambiguous, incomplete or otherwise subject to criticism." *Somer v. Johnson*, 704 F.2d 1473, 1477-78 (11th Cir. 1983) (quoting *Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982)); *Verbraeken v. Westinghouse Elec. Corp.*, 881 F.2d 1041, 1050 (11th Cir. 1989). We reverse where we are "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Somer*, 704 F.2d at 1478 (quoting *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981)); *Johnson*, 671 F.2d at 1280.

After review of the jury charge as a whole and counsels' entire closing arguments, we are convinced that the jury properly understood the issues and applicable law. Family Dollar has shown no reversible error in the charge.

First, Family Dollar challenges the district court's jury instruction on willfulness. However, the district court used the Eleventh Circuit Pattern Jury Instruction 1.7.1 that in order to prove willfulness, Plaintiffs must establish that Family Dollar knew, or showed reckless disregard for, the fact that its conduct was forbidden by the FLSA. The charge is consistent with our case law outlined earlier. *See Alvarez Perez*, 515 F.3d at 1162-63. The district court's decision not to elaborate further was within its discretion.

Second, Family Dollar challenges a part of the executive exemption charge. Family Dollar cannot and does not quarrel with the vast majority of the charge. That is because the court issued lengthy and comprehensive instructions on the executive exemption issue that fully captured the applicable regulations and factors. For example, the court instructed the jury that Family Dollar had to prove that: Plaintiffs made over $250 a week, their primary duties were management, and they customarily and regularly directed the work of two or more employees or their equivalent. With respect to the primary duty element, the court stated that primary duty means the main, major, or most important duty performed by the employee, and that in determining whether an employee's duties are his or

her primary duty, the jury should consider all of the facts surrounding the employment.

The court also instructed that the "rule of thumb" is that primary duty means that the major part, or more than 50% of the employee's time, was spent in performing executive duties. But it clarified that time alone is not the only factor in determining whether the employee's duties were primarily managerial and that an employee's primary duty may be executive even if the employee spends less than half of his or her time in such work.

In addition, the court told the jury to consider these primary duty factors: (1) the relative importance of executive duties compared with non-executive duties, (2) the frequency with which the store managers exercised discretionary powers, (3) their relative freedom from supervision, and (4) the relationship between store managers' salaries and wages paid to other employees for nonexempt work.[81]

Importantly for this case, the court also issued a concurrent duties instruction stating: "An executive employee may sometimes perform non-exempt or non-managerial duties concurrent with his executive duties, so long as the non-exempt duties are not his primary

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81. *See* 29 C.F.R. § 541.700(a) (2006); 29 C.F.R. § 541.103 (2003).

duties."[82] Family Dollar requested this charge. In its closing argument, Family Dollar then used the concurrent duties charge to stress that store managers who performed nonexempt tasks (stocking shelves, cleaning the store, etc.) alongside their subordinates do not lose their exempt status since the store managers' primary duty was to manage the store.

Family Dollar's principal complaint on appeal is that the court should not have added this part: "A working or supervising foreman works alongside his or her subordinates performing the same kind of work as the subordinates, and carrying out supervisory functions" and "are not executives within the meaning of the law."

Family Dollar correctly points out that there is a regulation entitled "working foremen," *see* 29 C.F.R. § 541.115 (2003), and that its stated purpose is to clarify one aspect of the long test.[83] But Family Dollar argues that this means the court's working or supervising

82. The court also defined exempt and nonexempt work, and emphasized that continuous physical presence at a store is not an essential requirement for determining whether an employee supervised two or more employees. The court instructed that "job title alone" is not enough to determine whether an employee is exempt, but rather that the jury must examine "the employee's salary and actual job duties." The court also instructed that work that is directly and closely related to executive work is considered executive work, even if it includes routine menial tasks.

83. *See supra* note 48.

foreman instruction does not apply in a short test case. And, therefore, the court should not have used the instruction at all. *See Hays v. Pauls Valley*, 74 F.3d 1002, 1008 (10th Cir. 1996) (noting that the "working foreman" provision "does not apply to the short test"). *But see Shockley v. City of Newport News*, 997 F.2d 18, 26 (4th Cir. 1993) (noting that even when the short test applies, "[t]he 'working foreman' concept is useful because it helps to distinguish between a manager of a recognized subdivision and a mere supervisor of subordinate employees"). Plaintiffs respond that the short test-long test distinction was abolished in 2004, and that the concurrent duties regulation references a "working supervisor." *See* 29 C.F.R. § 541.106(c) (2006) (contrasting role of working supervisor to exempt executive). Further, Plaintiffs argue that even if the working foreman regulation does not technically apply, the working or supervising foreman concept still provides a helpful example of how to apply the exemption defense. Plaintiffs point out that even we have referenced the concept of a working foreman to express ideas embodied in the short test. *See Brock*, 835 F.2d at 826.

Although the parties hotly dispute whether the working foreman regulation applies, there is no need to resolve that thorny question in order to determine whether this particular jury charge was error here. In order for Family Dollar to prevail, it must do more than show that the working or supervising foreman charge was technically inapplicable. It must demonstrate that the charge, combined with all of the other instructions

on the executive exemption issue, undermined the jury's ability to correctly understand the applicable law and resolve the executive exemption issue. In the vernacular of our precedents, it must either mislead the jury or leave us with a "substantial and ineradicable doubt" as to whether the court properly instructed the jury.

Family Dollar has not made this showing. Family Dollar overstates the significance of the working or supervising foreman charge. The charge relates to only a narrow slice of the executive exemption issue-how to deal with supervisors who work alongside of, and do the same work as, other employees. At root, it is designed to illustrate that an employee who performs the same nonexempt, manual tasks as his co-workers is not an executive even though he is technically a supervisor. Even assuming that concept is inapplicable here—a proposition that we by no means concede—the concurrent duties instruction cures any potential confusion from the working or supervising foreman charge. The concurrent duties instruction makes clear that one can still be an exempt executive even though he performs a plethora of nonexempt duties at the same time as exempt duties. Indeed, the court also accurately told the jury that a store manager may be exempt even though he spends more of his time on nonexempt duties provided that his primary duty is management.

After reviewing the charge as a whole and the closing arguments, we are convinced that the jury was fully and accurately advised that an exempt executive may do exempt and nonexempt work concurrently so

long as his primary duty is managerial. Although it may have been better for the court to have avoided using the working foreman charge, Family Dollar has shown no reversible error here.

VIII. CONCLUSION

For all of the above reasons, we affirm the district court's judgments.

AFFIRMED.

APPENDIX B — AMENDED FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED APRIL 16, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

Civil Action Number
7:01-cv-0303-UWC

JANICE E. MORGAN and BARBARA RICHARDSON, on behalf of themselves and all other similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES, INC.,

Defendant.

AMENDED FINAL JUDGMENT

The Defendant's Renewed Motion For Judgment as a Matter of Law, Motion for a New Trial, and Motion to Alter or Amend the Judgment, (Doc. 654), and any other pending motion, separately and severally, are hereby DENIED.[1]

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1. The reasons for the Court's denial of the referenced motion are adequately set forth in the Plaintiffs' Opposition to Defendant's Renewed Motion, (Doc. 667), incorporated herein by reference as if fully set forth.

Appendix B

The Final Judgment entered herein on March 31, 2006, is hereby SUPPLEMENTED by the additional amount of $1,164,040.42 as overtime backpay and an additional $1,164,040.42 as liquidated damages.[2]

Thus, the remaining Plaintiffs and the Trustees for the bankruptcy estates of the designated bankrupt Plaintiffs shall have and recover of the Defendant Family Dollar Stores the sum of **$17,788,029.74** as overtime backpay and the additional amount of **$17,788,029.74** as liquidated damages.

The costs of this action are taxed against the Defendant.

Done the 16th day of April, 2007.

s/ U.W. Clemon
U.W. Clemon
United States District Judge

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2. The supplemental amount represents backpay for unpaid overtime due to the bankrupt Plaintiffs listed in Exhibit A to the Notice of Substitution and Joinder, (Doc. 693), except with respect to Donald Bell, Joseph Allen Henry, Lynna R. Lehmkuhl, Sherry L. McCoy, Amber Sue Nelson, and Margaret Jo Rogers. (*See* Doc. 694, Family Dollar's Motion to Strike or Alternatively Opposition and Response to Notice of Substitution and Joinder at Ex. 2.)

APPENDIX C — FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED MARCH 31, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action Number
7:01-cv-0303-UWC

JANICE MORGAN, BARBARA RICHARDSON, CORA CANNON, and LAURIE R. TROUT-WILSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES,

Defendant.

FINAL JUDGMENT

Based on the Special Verdict of the Jury, and the dismissal of the claims of those Plaintiffs who are barred by the doctrine of judicial estoppel or a lack of standing,[1]

1. Within ten days, any Bankruptcy Trustee may petition the Court by a Motion to Alter or Amend the Judgment to be substituted in the place of a Plaintiff who has been dismissed on grounds of judicial estoppel or for want of standing.

the remaining Plaintiffs shall have and recover of the Defendant the sum of Sixteen Million Six Hundred twenty-three Thousand Nine Hundred Eighty-nine and 32/100 Dollars **($16,623,989.32)**.

Based on the Jury's finding of wilfulness and the Court's finding that the Defendant did not carry its burden of proof of good faith in violating the overtime provisions of the Fair Labor Standards Act, liquidated damages in the amount of Sixteen Million Six Hundred twenty-three Thousand Nine Hundred Eighty-nine and 32/100 Dollars **($16,623,989.32)** are also awarded to the Plaintiffs.

The costs of this action are hereby assessed against the Defendant.

Done the 31st day of March, 2006.

s/ U.W. Clemon
U.W. Clemon
Chief United States District Judge

APPENDIX D — MEMORANDUM OPINION ON MOTION TO DECERTIFY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED JANUARY 13, 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

Civil Action Number
7:01-cv-0303-UWC

JANICE MORGAN and BARBARA RICHARDSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES, INC.,

Defendant.

MEMORANDUM OPINION ON MOTION TO DECERTIFY

Appendix D

In the first stage of this action under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.* ("FLSA"),[1] the Court certified it as a collective action. (R., Doc. 62.) The Court certified the class based on the similarities between the working conditions of the named and opt-in Plaintiffs at the Defendant Family Dollar Stores,

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1. The FLSA requires that covered employees be paid at one-and-a-half times their regular hourly rate for hours worked in excess of forty hours per week. *See* 29 U.S.C. §207 (a) (1) (1998). Exempted from this requirement is "any employee employed in a bona fide executive . . . capacity . . . ." 29 U.S.C. § 213 (a) (1) (1998). The current "executive employee exemption" is defined by the Secretary of Labor as covering an employee who meets the following criteria:

> (a) " . . . is compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;"
>
> (b) whose "primary duty is management of the enterprise in which the employee is employed," or of a customarily recognized subdivision of the employer's enterprise;
>
> (c) "customarily and regularly directs the work of two or more other employees;" and
>
> (d) "has the authority to hire or fire other employees" or whose recommendations as to hiring, firing, and promoting of other employees are "given particular weight."

29 C.F.R. § 541.100 (2005).

Inc. ("Family Dollar"). Having completed discovery, Family Dollar has now moved to decertify the class at this second stage of the proceedings.

The relevant factors to be considered at the decertification stage are as follows: 1) similarities in the employment setting and factual situation, 2) the existence *vel non* of defenses individual to each plaintiff, and 3) fairness and procedural considerations. *Brooks v. BellSouth Telecommunications*, 164 F.R.D. 561, 568 (N.D. Ala. 1995) (citing factors set out in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 359 (D.N.J. 1988)), *aff'd without opinion*, 114 F.3d 1202 (11th Cir. 1997); *Bradford v. Bed, Bath & Beyond, Inc.*, 184 F. Supp. 2d 1342, 1346 (N.D. Ga. 2002); *Stone v. First Union Corp.*, 203 F.R.D. 532, 543 (S.D. Fla. 2001).

For the reasons that follow, the decertification motion is due to be denied.

I. Similarities in the Employment Setting and Factual Situation

The facts found in the Court's November 7, 2002, Memorandum Opinion have not been called into question by the subsequent discovery. They are incorporated herein by reference. *(See* R., Doc. 61.)

Family Dollar now operates more than 5,200 retail discount stores in forty-one (41) states and the District of Columbia. Family Dollar sells a variety of products, ranging from groceries to household furnishings and

automotive supplies. For the 2002 fiscal year, annual store sales for individual stores varied from $210,000 to over $4.1 million.

Family Dollar's retail operations are divided into divisions, regions, districts, and stores. Family Dollar has five (5) divisions, and each is headed by a vice president. Each division is further divided into multiple regions. Family Dollar has a total of nineteen regions and each is headed by a regional vice president. Each region is further divided into multiple districts, which are supervised by district managers. Family Dollar has approximately 300 districts, and each district contains multiple stores.

Each store is staffed with a salaried store manager, at least one hourly-paid assistant manager, and at least two hourly-paid clerks. Weekly salaries for store managers range from $400 to over $1,100, plus an additional performance bonus.

The evidence confirms that substantial similarities exist in the job duties of the named and opt-in Plaintiffs. According to Family Dollar, most (90%) of the named and opt-in Plaintiffs interview and train new employees. (*See* R., Doc. 255, Quarles Aff. at Ex. 2,3.) Most of them direct the work of the employees in their stores, and maintain production and sales records. (*See id.*) Further, two out of three (67%) opt-in Plaintiffs supervise fewer than two employees who worked eighty hours per week. (*See id.*)

The evidence also reveals similarities in the managerial duties for which the named and opt-in Plaintiffs were not responsible. Although classified as store managers, all of the named and opt-in Plaintiffs lack independent authority to hire, promote, discipline, or terminate assistant managers. (R., Doc., 294, Pl.'s Br. at Exs. B, P.) Additionally, they all lack the authority to grant pay raises to employees. (*Id.*) Nor are the named and opt-in Plaintiffs authorized to change the weekly schedules of the hourly employees in their stores; rather, these schedules are set by the corporate office. (*Id.*) Moreover, most of the named and opt-in Plaintiffs are not empowered, in emergencies, to close the stores without the approval of their district manager. (*Id.*)

Thus, none of the named and opt-in Plaintiffs are responsible for the total operation of their stores. Much of the management discretion which would ordinarily be exercised by store managers is exercised by the district management pursuant to corporate policies and practices set at headquarters. The store managers are very closely supervised by the district managers. In terms of managerial duties, the district manager is more directly responsible for the operation of a Family Dollar store than the store manager.

In addition to the above, similarities also exist as to how the Plaintiffs spend their time between managerial and non-managerial duties. Most of the named and opt-in Plaintiffs spend only a small fraction of their time

performing managerial duties.[2] They spend the vast majority of their time on essentially non-managerial duties such as unloading trucks, stocking shelves, working as cashiers, and performing janitorial duties. (*See* R., Doc. 294, Pl.'s Br. at Exs. B, C, D, E.) Even some of their managerial functions are shared with non-exempt, hourly employees. (R., Doc. 294, Pl.'s Br. at Ex. E.) These shared functions include ordering merchandise, controlling the keys to the store, opening and closing the store, making bank deposits, approving checks, refunds, and returns. (R., Doc. 294, Pl.'s Br. at Ex. C.) Viewed as a whole, the primary duty of the named and opt-in Plaintiffs is non-managerial. The relative time the Plaintiffs spend in performing non-managerial duties does not significantly differ from store to store, district to district, or region to region. Likewise, the relative importance of the non-managerial duties over the limited number of managerial duties for which the named and opt-in Plaintiffs were responsible, did not vary significantly according to store, region, or district.

As with their managerial and non-managerial duties, the basic pay rates of the named and opt-in Plaintiffs are also similar. For example, Family Dollar pays all of its store managers a base salary regardless of the weekly hours they work. (R., Doc. 250, Def.'s Br. at p. 10.)

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2. Of course, the time spent in performing managerial duties is not alone determinative of exempt status. *Donovan v. Burger King Corp.*, 672 F.2d 221, 225-26 (1st Cir. 1982); *Guthrie v. Lady Jane Collieries, Inc.*, 722 F.2d 1141, 1144-45 (3d Cir. 1984); *Lott v. Howard Wilson Chrysler-Plymouth, Inc.*, 203 F.3d 326, 331 (5th Cir. 2000).

Appendix D

II. Individualized Defenses

The differential in pay rates of store managers is not problematic in this collective action. Should a violation of the FLSA be established, the backpay due each store manager can be determined by using a formula to derive the expected hourly rate for each store manager based on their annual salary. The calculation of hourly rates may be accomplished by expert evidence.

The statute of limitations defense is likewise not a bar to the treatment of this case as a collective action. The date on which each opt-in plaintiff joined this action is a matter of public record on file in this Court; the date on which they commenced and/or terminated employment with Family Dollar is easily ascertainable.

Family Dollar's defenses to this action are not sufficiently individually tailored to each plaintiff such that a collective action is unmanageable.

III. Fairness and Procedural Considerations

Because of the substantial similarities of their job duties, and because of Family Dollar's company-wide policies and procedures relating to its store managers, the plaintiffs may rely on representative testimony to establish liability and obtain relief, if such is warranted under the FLSA. This scenario is similar to that in the trial of certified class actions under Rule 23 (b) (3), where the testimony and evidence put forth by class

representatives binds the unnamed class members. *See* Fed. R. Civ. Proc. 23 (c) (3) (providing that judgments in class actions maintained pursuant to Rule 23 (b) (3) shall apply to those who received notice, did not opt out of the class, and whom the court finds to be members of the class); 7B Charles Alan Wright et al., *Federal Practice and Procedure* §§1786, 1789 (2d ed. 1986).

Thus, notions of due process and fairness are not offended by a collective trial in these circumstances. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946).

For these reasons, Family Dollar's Motion to Decertify will be DENIED by separate order.

Done this 12th day of January, 2005.

s/ U.W. Clemon
U.W. Clemon
Chief United States District Judge

APPENDIX E — MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA, WESTERN DIVISION FILED NOVEMBER 7, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA WESTERN DIVISION

CIVIL ACTION NUMBER: 01-C-0303-W

JANICE MORGAN, BARBARA RICHARDSON, CORA CANNON, and LAURA R. TROUT-WILSON, on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

FAMILY DOLLAR STORES, INC.,

Defendant.

MEMORANDUM OPINION

Before this Court is Plaintiffs' Renewed Motion to Facilitate Nationwide Notice (Document 47). For the reasons elaborated herein, this Court will GRANT Plaintiffs' Renewed Motion to Facilitate Nationwide Notice.

Appendix E

STATEMENT OF FACTS

Plaintiffs filed this lawsuit on behalf of themselves and all others similarly situated against Defendant Family Dollar Stores, pursuant to Section 216(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* (Plaintiffs' Third Amended Complaint.) This action is brought to recover unpaid overtime compensation allegedly owed to Plaintiffs. (*Id.* at ¶ 11.) Plaintiffs contend that they and other similarly situated managerial employees were required to perform both managerial and non-managerial duties without receiving overtime compensation. (*Id.* at ¶ 19.) Plaintiffs assert that, for at least three years prior to the filing of this Complaint, Defendant has had a uniform policy and practice of consistently requiring its alleged "managerial" employees to work sixty to ninety hours per week for a salaried amount without overtime compensation. (*Id.* at ¶ 11.) The seven named Plaintiffs are or were employed by Defendant in positions titled "manager." However, the managerial duties of the named Plaintiffs' were minimal as compared to other job duties they regularly performed. (*Id.*) Plaintiffs contend that they performed managerial duties for only approximately five to ten hours per week. (*Id.*) The remainder of their time is or was spent performing non-managerial functions including, but not limited to, operating the cash registers, stocking merchandise, and performing various janitorial duties. (*Id.*) Even though these employees have stated that they worked between twenty and fifty hours per week in excess of the required forty hours, and the vast majority of their hours worked

were spent performing non-managerial job functions, the employees did not receive any overtime compensation. (*Id.*)

The named plaintiffs, and all similarly situated employees who elect to participate in this action, seek unpaid overtime compensation, prejudgment interest on award of back-pay, an equal amount of liquidated damages, attorney's fees, and costs pursuant to 29 U.S.C. § 216(b). (*Id.*)

DISCUSSION

Plaintiffs' counsel first filed a Motion to Facilitate Notice to all class members on April 26, 2001. (Document 13.) Defendant's counsel objected to that motion on the following three grounds: (a) Plaintiffs' motion was premature because the parties agreed to an initial period of preliminary discovery; (b) Plaintiffs failed to satisfy the requirements for opt-in notice under Section 216(b) of the FLSA; and (c) Plaintiffs' proposed notice to class members was deficient and erroneous. (Plaintiffs' Renewed Motion to Facilitate Notice, at p. 2; Documents 31, 34.) This Court denied that motion without prejudice on May 7, 2001. (Document 20.)

Plaintiffs' counsel filed a Renewed Motion to Facilitate Notice on October 18, 2001. (Document 31.) This Court rendered Plaintiffs' renewed motion moot on April 22, 2002. (Document 40.)

Appendix E

Plaintiffs' counsel filed the currently pending Renewed Motion to Facilitate Nationwide Class Notice on October 3, 2002. (Document 47.) The motion requests permission to send notice to all former and current Store Managers who work and/or worked for the Defendant over the last three years. (Plaintiffs' Motion to Facilitate Nationwide Class Notice at ¶ 13.) Likewise, Plaintiffs' counsel requests a computer generated list of potential opt-ins (including the individuals' names, last known address, Social Security number, and store location(s) where they worked) within two weeks of the entry of an Order granting this motion. (*Id.*)

Following more than twenty months of litigation, there are seven named Plaintiffs in this lawsuit. (Document 38.) Plaintiffs' counsel proposes facilitating nationwide class notice to all current and former Store Managers employed in Family Dollar Stores' approximately 4,545 stores in operation located in 40 states. (Wiggins Aff. at ¶ 1.) Plaintiffs' counsel estimates that there are approximately 11,164 current and/or former Store Managers who have not been notified of the pending litigation. (Plaintiffs' Renewed Motion to Facilitate Nationwide Class Notice at ¶ 6.)

The pre-requisite to Section 216(b) notice is that the Plaintiffs meet an evidentiary burden consisting of two primary factors. At a minimum, Plaintiffs must show that: (1) there are other employees who desire to opt-in; and (2) these other employees are similarly situated (to the named Plaintiffs) with respect to their job requirements and pay provisions. *Dybach v. State of*

Florida Department of Corrections, 942 F.2d 1562, 1567-68 (11th Cir. 1991). The *Dybach* Court noted that "[i]f the district court concludes that there are such other employees, we leave it to the district court to establish the specific procedures to be followed with respect to such possible 'opting-in.'" *Id.* at 1568.

After deposing the seven original plaintiffs and opt-ins in the case at bar, counsel for the parties jointly agreed to send notice of the pending lawsuit to current and former Store Managers in the regions where the seven plaintiffs worked from July 1, 1999 until the present. (Plaintiffs' Renewed Motion to Facilitate Nationwide Class Notice at ¶ 3.) On July 24, 2002, 784 notices were sent to former and current Store Managers who worked in these three corporate regions. (*Id.*) Of the 784 notices mailed, approximately 85 of these notices were returned due to incomplete or inaccurate addresses. (*Id.*)

As of October 3, 2002, 142 Consent to Join forms have been filed with this Court from individuals who worked and/or currently live in ten states. (Wiggins Aff. at ¶ 3.) Plaintiffs' counsel contends that this satisfies the "numerosity" requirement stated in *Dybach*. Additionally, Plaintiffs' counsel states that they have received approximately forty telephone calls from individuals who: (1) have indicated their desire to join the lawsuit and are in the process of filing their Consent to Join forms; and/or (2) did not receive notice of the lawsuit, but, by way of "word of mouth" notice of the

lawsuit, have indicated a desire to join. (Plaintiffs' Renewed Motion to Facilitate Nationwide Class Notice at ¶ 4.)

Of the 142 individuals who have already filed Consent to Join forms, there are several similarities among the members of the group, including: (a) the opt-ins were or are required to work sixty to eighty hours per week; (b) they are paid a fixed, weekly salary; (c) they spend approximately 75-90% of their time performing non-managerial duties such as operating the cash register, stocking shelves, unloading trucks, and performing janitorial duties; (d) they are required to report to work before the store is open for business and are required to remain at the store after the store is closed; (e) they do not always supervise two or more employees; (f) they cannot hire, discipline, and/or terminate employees without first obtaining permission from their supervisor; (g) they cannot select outside vendors for the store without obtaining permission from their supervisors; and (h) the store managers have been denied time off from their jobs and threatened with loss of pay if, in fact, they do not work a minimum of forty-eight hours per week. (*Id.* at ¶ 8; responses from questionnaires, Document 57.) Plaintiffs' counsel asserts that these similarities among the opt-ins and the named Plaintiffs satisfy the "similarly situated" requirement from *Dybach*.

Plaintiffs' currently pending motion to facilitate nationwide class notice is their third such attempt. To date, there are seven named Plaintiffs in this suit.

Counsel for the parties jointly decided that those seven plaintiffs were sufficiently similarly situated so as to justify the mailing of notices to 784 former and/or current Store Managers in three of Defendant's corporate regions. Of the 699 notices that were not returned for faulty address, this Court has already received 142 Consent to Join forms. The 142 opt-ins represent slightly more than a 20% response rate from the pool of notices sent in July. Plaintiffs' counsel has filed under seal with this Court copies of questionnaires received from opt-ins in Mississippi, Alabama, Georgia, and New York demonstrating multiple similarities found among the opt-ins received to date. Based on the information received to date, this Court finds that the Plaintiffs have satisfied the numerosity requirement for nationwide class notice. Similarly, this Court finds that the facilitation of nationwide class notice to more than 11,000 potential class opt-ins would not result in this case becoming "literally unmanageable," as Defendant's counsel has asserted.

Likewise, while this Court acknowledges that there exist some differences between the named Plaintiffs and the opt-ins in terms of pay scale and job duties, these differences do not preclude the facilitation of nationwide service. After all, the requirement in *Dybach* is that Plaintiffs be *similarly situated*; *Dybach* does not require that they be identically situated. Furthermore, simply noting that stores have different locations, are of various sizes, and sell different volumes of merchandise does not conclusively indicate that the job responsibilities and salaries of Store Managers are not

similar. Once again, the applicable standard is "similarly situated" — not identically situated — and it is a matter within the sound discretion of the trial court to determine whether the standard has been satisfied. This Court finds that Plaintiffs have satisfied this standard.

CONCLUSION

Based on these findings, this Court concludes that Plaintiffs have satisfied the numerosity and "similarly situated" requirements to justify facilitation of nationwide notice. Accordingly, this Court GRANTS Plaintiffs' Renewed Motion to Facilitate Nationwide Class Service by separate order.

DONE this 7th day of November, 2002.

s/ U.W. Clemon
Chief United States District District Judge
U.W. Clemon

APPENDIX F — PERTINENT FLSA REGULATIONS

29 C.F.R. § 541.1 (2003). Executive

The term *employee employed in a bona fide executive * * * capacity* in section 13(a)(1) of the Act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in

paragraphs (a) through (d) of this section: *Provided*, That this paragraph shall not apply in the case of an employee who is in sole charge of an independent establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed; and

(f) Who is compensated for his services on a salary basis at a rate of not less than $155 per week (or $130 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands, or American Samoa), exclusive of board, lodging, or other facilities: *Provided*, That an employee who is compensated on a salary basis at a rate of not less than $250 per week (or $200 per week, if employed by other than the Federal Government in Puerto Rico, the Virgin Islands or American Samoa), exclusive of board, lodging, or other facilities, and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein, shall be deemed to meet all the requirements of this section.

Appendix F

29 C.F.R. § 541.102 (2003). Management

(a) In the usual situation the determination of whether a particular kind of work is exempt or nonexempt in nature is not difficult. In the vast majority of cases the bona fide executive employee performs managerial and supervisory functions which are easily recognized as within the scope of the exemption.

(b) For example, it is generally clear that work such as the following is exempt work when it is performed by an employee in the management of his department or the supervision of the employees under him: Interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning the work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety of the men and the property.

Appendix F

29 C.F.R. § 541.103 (2003). Primary duty

A determination of whether an employee has management as his primary duty must be based on all the facts in a particular case. The amount of time spent in the performance of the managerial duties is a useful guide in determining whether management is the primary duty of an employee. In the ordinary case it may be taken as a good rule of thumb that primary duty means the major part, or over 50 percent, of the employee's time. Thus, an employee who spends over 50 percent of his time in management would have management as his primary duty. Time alone, however, is not the sole test, and in situations where the employee does not spend over 50 percent of his time in managerial duties, he might nevertheless have management as his primary duty if the other pertinent factors support such a conclusion. Some of these pertinent factors are the relative importance of the managerial duties as compared with other types of duties, the frequency with which the employee exercises discretionary powers, his relative freedom from supervision, and the relationship between his salary and the wages paid other employees for the kind of nonexempt work performed by the supervisor. For example, in some departments, or subdivisions of an establishment, an employee has broad responsibilities similar to those of the owner or manager of the establishment, but generally spends more than 50 percent of his time in production or sales work. While engaged in such work he supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles

customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require. He will be considered to have management as his primary duty. In the data processing field an employee who directs the day-to-day activities of a single group of programmers and who performs the more complex or responsible jobs in programming will be considered to have management as his primary duty.

29 C.F.R. § 541.100 (2006). General rule for executive employees

(a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and

recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase "salary basis" is defined at § 541.602; "board, lodging or other facilities" is defined at § 541.606; "primary duty" is defined at § 541.700; and "customarily and regularly" is defined at § 541.701.

29 C.F.R. § 541.102 (2006). Management

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

Appendix F

29 C.F.R. § 541.105 (2006). Particular weight

To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

29 C.F.R. § 541.106 (2006). Concurrent duties

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when

to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the

employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

29 C.F.R. § 541.700 (2006). Primary duty

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their

time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

APPENDIX G – LIST OF ALL NAMED AND OPT-IN PLAINTIFFS AND NOW RESPONDENTS

Alfred Abbitt
Janie Martinez Abbl
Najah M. Abdullah
Maria G. Acosta
Victor M. Acosta
Bernice E. Adams
Don E. Adams
Judy G. Adcock
Kym M. Adler
Scott A. Agee
Ricky R. Aggison
Patricia Aguirre
Cathy R. Albritton
Michelle J. Aldridge
Jeana M. Alessandra
Angela Faye Alexander
Elizabeth A. Alexander
Linda N. Alexander
Abdul R. Allen
Debbie Sperduto Allen
Krista M. Allen
Renee K. Allen
Thomas W. Allen
Ramon E. Allende
Gloria Allison
Antoine Alston
Catherine Elaine Alston
Anna Gayle Alvey
Marilyn R. Amico
Randall E. Amos
Roseann M. Andersen
Barbara D. Anderson
Brenda l Anderson
Carolyn A. Anderson
Cynthia J. Anderson
David D. Anderson
Glen R. Anderson
Jacquelyn Anderson
Keya L. Anderson
Nita R. Andrews
Cynthia K. Angle
Javier O. Arcila
Rueben R. Arellano
Ester Argullin
Joe l Arrellin
Ralph M. Arter
Nellie M. Ashburn
Kathleen M. Ashby
Forest Asher
Cheryl L. Ashry
Tracey D. Atchison
Charles M. Atchley
Angela J. Atkins
Arlene L. Atkins
Mike Atma
Harvey W. Attaway
Jean Atteberry
Petra C. Avitia
Darla L. Babcock
April L. Backlin
Cheryl J. Backus
Bass Brendann Bailey

Appendix G

Nina S. Bailey
Vicky Y. Bailey
Deona J. Baisden
Samantha M. Baker
Shirley I. Baker
Verna L. Baker
Melissa A. Balicki
Karen S. Ball
Mary E. Ball
Misty J. Ball
Tawana L. Balthrop
Patricia L. Banasiak
Carolyn A. Bane
Johnny L. Banner
Raymie Baptist
Alexander Barakh
Suzette Marie Barbe
Delores W. Barber
Mary C. Barentine
Karen Rena Barfield
Stephen W. Barnard
Charles Barnes
Lillian Barnes
William T. Barnett
Delia Barrera
Leota M. Bartoli
Kenneth R. Baumeister
Garry N. Beam
Ingrid R. Beasley
Scott M. Beatty
Cathy L. Becker
Rhonda Beckwith-Grindstaff
Patricia Ann Beers
Camile R. Bell
Donald W. Bell
Ruth A. Bell
Veronica G. Bell
Charles D. Bennett
Carolyn A. Benton
Thomas H. Benzenhafer
Eleanor E. B.erk
Preciliana B. Bernal
Porfirio J. Berrios
Abuwi Beyah
Monty J. Beyer
Misty S. Bice
Jonathan B. Bichkoff
Robert Joseph Bilski
Cheryl Bingaman
Donnelda C. Bingham
Patrica A. Bitner
Angelina Blackburn
Cherie A. Blackman
Torey R. Blackman
Margaret R. Blackwell
Rhonda A. Blackwell
Rita K. Blair
Julie S. Blakeney
Cathy Lynn Blanchard
Carla D. Blankenship
Judy K Bloss
Julie M. Bly
Wilma E Bobbitt
Demetria M. Bolden

Appendix G

Joni S. Bolden
Brenda K. Boleware
Diana L. Bollich
Michelle L. Bolster
Avis N. Boren
Constance M. Bowden
Doreen Bowers
Keith A. Bowman
Karen M. Boyce
Yolanda F. Boynton
Jamel H. Bracey
Katherine B. Bracey
Beverly Brackson
Jennifer M. Braden
Janet L. Bradley
Jennie L. Bradley
Teresa C. Bradshaw
Ruby N. Brady
Reginald B. Brandon
Sallie E. Brandt
Connie A. Brayboy
Diane M. Bremer
Tyrus R. Bremer
John J. Brendel
Robert Brenon
Greg K. Brewer
Nikki L. Brewer
Sonya A. Brewer
Daniel J. Bringle
Connie Y. Briscoe
James Michael Britt
Lesa Brock
Marie A. Brockway
Willard P. Brooks
Jerome D. Broussard
Alfonso Brown
Arlise F. Brown
Betty A. Brown
Deborah S. Brown
Joseph P. Brown
Judy B. Brown
Justin E. Brown
Lawana F. Brown
Lona M. Brown
Lorraine S. Brown
Michael E. Brown
Michael J. Brown
Paula Schiavi- Brown
Shellah E. Brown
Thomas W. Brown
Janet Browne
Dianne B. Brown-Owens
Wandra Bruins
Clide T. Bruner
Keith A. Brunner
Lori A. Bryan
Dwayne K. Bryant
Mary C. Buelin
Rebecca F. Burch
Anthony Burke
Linda M. Burke
Lisa A. Burke
Tamara M. Burns
Jeanette G. Burpoe

Appendix G

Sally Bustillos
Glen John Butka
Jr. Earl Butler
Kathy A. Butler
Melanie G. Butler
Sarah N. Butler
Sharon Lynn Butler
Chester Cabebe
Donald C. Cadman
Tomelita B. Caffey
Pamela D. Cagle
Lisa M. Cairns
Marie Andreil Calais
Rebecca J. Calcione
Arturzillo G. Caldwell
Charles D. Campbell
Cora Cannon
Geraldine A. Cannon
Jeanette Cannon
Rosa Linda Canoba
Kathleen G. Cardillo
Linda Carlson
Beverly R. Carpenter
Ken J. Carpenter
Dale I. Carr
Josue N. Carrera
Sylvia C. Carrillo
Melissa A. Carter
Norman V. Carter
Robert J. Carter
Steven T. Carter
Tamarla T. Carter
Jackie S. Cartrette
Baccuhus H. Carver
Fleta M. Casey
Virginia G. Caskey
Stephen R. Castille
Lynn A. Cauwenbergh
Heathar L. Cecere
Nancy J. Cernansky
Amantha P. Chandler
Gloria S. Charles
Wagner Charles
Maxima Chavarria
Joe O. Cheadle
Josh L. Cheek
Susan M. Chelski
Linsley A Cherisier
Yvette T. Chester
Emry D. Chesterfield
Terry L. Chewning
Regina G. Childress
Donna A. Christoff
Chester L. Clark
Latossia B. Clark
Robert L. Clayton
Wayne J. Clemens
Kenneth E. Cline
Vickie L. Clutter
Delia C. Cly
James W. Cobb
Lisa P. Coelho
Louis C. Coffee
Tamie S. Coggins

Appendix G

Lloyd D. Cohen
Douglas Neil Cole
Judith C. Coleman
Alva A. Coles
Shawn N. Colvin
Betty L. Combs
Diane R. Conaway
Melanie N. Conkle
Judith A. Conley
Thomas P. Conmy
Wanda L. Connell
Nancy A. Connelly
Daniel A. Conner
Sandra L. Conner
Clarice Conway
Shelby J. Cook
Kathy G. Cooke
Patti m Cooke
Beatrice M. Cooks-Smith
Bettina L. Copeland
Michelle L. Cordeiro
Tammy R. Cornish
Efrain Ramos Correa
Daniel J. Correira
Judy A. Corrow
Candace J. Corsaro
Teresa R. Corwin
Vicki l Cotton
Louis E. Couch
Richie H. Cousin
Mary L. Covington
Mary R. Cox
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Carol L. Wilkesmore
Melvin P. Wilkins
Howard L. Wilkinson
Bonnie S. Williams
Carolyn Y. Williams
Debbie D. Williams
Grayling Williams
Jacqueline Williams
Joyce E. Williams
Kernan C. Williams
Kimmerly Williams
Lucretia M. Williams
Michael Williams
Michele A. Williams
Ralph K. Williams
Shonndrika S. Williams
Virginia M. Williams
Theresa Veronica Wilmot
Carla I. Wilson
Cindy Ann Wilson
Clara P. Wilson
Gail E. Wilson
Gloria Wilson
Laura K. Wilson
Patricia F. Wilson
Lyn M. Winget
Terry L. Wint
Paula Y. Winters
Bobbie J. Wisenburg
Edward Witherspoon
Valerie L. Wolf
Tricia I. Womack
Rhonda M. Womble
Chris C. Wood
Colleen R. Wood
Jackie L. Wood
Allan Woods
Alonzo R. Woods
Brenda C. Woods
Marcel Woods
Randy D. Woods
Anna Wooten
Brenda J. Worden
Brenda A. Workman
Walter W. Worth

Appendix G

Jerry D. Worthington
Antionette Wright
Casie L. Wright
James L. Wright
Lloyd A. Wyman
Annette Yates
Karen E. Yates
Nancy L. Yingling
Shirley A. Young
Andy L. Yzaguirre
Deborah L. Zajac
Evangelina Zamarripa
Julia Zamora
Cindy M. Zimbrich
Helen A. Zimmerman
Sonja E. Zimmerman
Georgia L. Zombro
Carol A. Zupancic

SUPPLEMENTAL APPENDIX

4-15-09

Supreme Court, U.S.
FILED

(7)

08 1287 APR 15 2009

144

No. 08- 1287

OFFICE OF THE CLERK
William K. Suter, Clerk

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX

ROBERT A. LONG
COVINGTON & BURLING LLP
1201 Pennsylvania Ave.
Washington, D.C. 20004
(202) 662-6000

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200 Clinton Avenue West
Suite 900
Huntsville, AL 35801
(256) 517-5198

Attorneys for Petitioner

221685

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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SUPREME COURT, U.S.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
WESTERN DIVISION

FILED
04 MAY 12 PM 4:15
U.S. DISTRICT COURT
N.D. OF ALABAMA

JANICE MORGAN, BARBARA RICHARDSON, on behalf of themselves and all others similarly situated,	)	
Plaintiffs,	)	**CIVIL ACTION NO.**
v.	)	**CV-01-C-0303-W**
FAMILY DOLLAR STORES, INC.,	)	
Defendant.	)	

AFFIDAVIT OF JOY QUARLES

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

Personally appeared before me, a Notary Public in and for said County and State, Joy Quarles, who being known to me, and first duly sworn, deposes and says:

1. My name is Joy Quarles. I am over the age of 19 and otherwise competent to give this affidavit. This affidavit is based upon my personal knowledge, the plaintiffs' depositions in this action, and information provided to me by the various attorneys at my firm who represent Family Dollar in this case and who took the depositions of the plaintiffs in this case.

2. I am employed as Legal Secretary at Bradley Arant Rose & White in Birmingham, Alabama.

3. I created the three attached Exhibits. Exhibit 1 is a chart entitled "Frequency of District Managers' (DM) Visits;" Exhibit 2 is a chart of "Management Duties (29 C.F.R. Sec.541.102)" which lists alphabetically the opt-in plaintiffs deposed and either a "Y" or "N" in some or all of the blocks following the name of the plaintiff; Exhibit 3 bears the same title as Exhibit 2 but instead of a "Y" or "N" in the following blocks, Exhibit 3 has numbers which correspond to page numbers in the respective plaintiff's deposition transcript (see below).

4. The printed information in Exhibits 1, 2, and 3 was entered into those exhibits by me by typing into each exhibit information that had been recorded on separate charts created for each respective plaintiff by the Family Dollar attorney who read and reviewed the testimony of that plaintiff in his/her deposition and then recorded the information listed. Thus, I was given by the respective attorneys involved in reviewing the plaintiffs' depositions separate charts for each individual plaintiff. I transcribed the information for each plaintiff received into the corresponding summary charts for all plaintiffs attached as Exhibits 1, 2, and 3. I then proofread the summaries I had created by comparing each plaintiff's information on the summary to the handwritten individual charts that had been given to me by each attorney and corrected any errors I found. I was instructed by Matt Miller, one of the attorneys involved, to leave a block empty on the summary sheet of Exhibit 2 if the handwritten individual sheet contained no information, had both a "Y" (or "yes") and an "N" (or "no"), or had "not applicable" or "N.A."

5. Further affiant sayeth not.

SA-2

Joy Quarles

STATE OF ALABAMA)
:
JEFFERSON COUNTY)

I, the undersigned, a notary public in and for said county in said state, hereby certify that Joy Quarles, whose name is signed to the foregoing instrument, and who is known to me, acknowledged before me on this day that, being informed of the contents of said instrument, she executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this 11th day of May, 2004.

Notary Public

[NOTARIAL SEAL] My commission expires: 2/4/07

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the above and foregoing Affidavit of Joy Quarles on:

Gregory O. Wiggins
Wiggins, Childs, Quinn & Pantazis
The Kress building
301 19th Street North
Birmingham, AL 35203

by delivering a copy of same to him on this 12th day of May, 2004.

James L. May
OF COUNSEL

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
1.	Adams, Bernice	Nick Hutton (51)							Steve Shaw (52-54)	
2.	Alexander, Angela Faye		Larry Grady – 3 times per month (45) Robin – three times per month (44-45)		Shane Little (45)					
3.	Allen, Krista	Donald Pickering (30)	David Allen (30) Bob (30)							
4.	Allende, Ramon	Neal Peterson (108)	Jim Jertson (87) Bob (30)							
5.	Alston, Catherine			Kelley Lee (38)	Bob Eckens (38)					
6.	Anderson, Brenda		Dick Gray (92)		Denise Dunlap (77)				Rick (?) (84-85)	
7.	Anderson, Carolyn		Dorothy Hopkins (59-61)						Randy Simones (58-59)	
8.	Arrellin, Joe		(31)							

S-2-S

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
9.	Attaway, Harvey			Jerry Phillips Wichita Falls, TX Store (27)	Jerry Phillips Graham, TX Store (27)					
10.	Avitia, Petra C	Mike Newman (38-39)			Ruben Rodriguez (38)					
11.	Backus, Cheryl									(40-41)
12.	Baker, Shirley		Pat – Columbus, GA (71)		Franklin, GA (46)					
13.	Barbe, Suzette		Chris Blackburn Sheila Black Chris Bowling Rich Smith (54-55, 125-26, 128)							
14.	Barber, Delores W.		Rick Savage (42-43) Bill Smith (45)		Larry Grady (46)				Shane Little (49)	
15.	Barrentine-Hurley, Mary			(158)						

SA-7

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
16.	Beam, Garry		Mike Roessleu Paul Alley (44)		Steve Prumty Daryl Wickert (45)					
17.	Beasley, Ingrid		(68-69)							
18	Bennett, Charles	John Ford Bob Lnu (33)								
19.	Berrios, Porfirio J.	Monty Ferguson twice a week (22-23)	Don Phillips (20-21)		Christina Vanderbilt (21)					
20.	Bice, Misty S				Linda (243)					
21	Blakeney, Julie			Gary Bailey (64)					Jill Mayo (64)	
22	Bloss, Judy Kay				Jerry Stinson					
23	Bly, Julie			Wendy Evans (63)						

SA-8

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
24	Bracey, Katherine B. Durham, NC	Joe Kowalizh (53)								
25	Brady, Ruby	Joann Palmer (24)								
26	Brenner, Tyrus		Russ Lanzafame Dave Haberkorn (118)							
27	Brown, Judy B.								Ed Revea (18) Genserner (19) Hollis & Terry Bryant (20)	
28	Brown, Shellah E								Linda Taylor (66)	
29	Brown, Tom	(131, 195)								
30	Browne, Janet		(42-43)							

SA-9

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
31.	Brown-Owens, Dianne	Ed Rueve – weekly or monthly (62)								
32.	Burke, Linda St. Petersburg, FL			Jennifer Beem (58)		Sandra Fowler (59)				
33.	Butler, Earl E. (Jr.)				Kevin Hogland (145)					
34.	Butler, Melanie G.						Geiger (39) Not that often – less than once a month			
35.	Butler, Sharon	Jerry Phillips (118) Vicki Christensen (83)								
36.	Caffey, Tomelita B Montgomery, AL[1]									
37.	Cannon, Cora H				John Gensmore (80)					

SA-10

[1] Worked only 1 month as SM and claim should be barred by 3 year SOL.

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
38.	Cannon, Geraldine				Lynn Bazinetta (78)					
39.	Carrera, Josue	John For (47) Alonza Salazar (48) Beatrice Gabino (50-51)								
40.	Carter, Norman V.	(177)								
41.	Carter, Robert J	John Gossemer (67)								
42.	Casey, Fleta		Sheila Wallur (66)		Calvin Watts (61-62)					
43.	Charles, Gloria S.		John Gensmore (78)							
44.	Chavarria, Maxima	Fidel Ramos (64)	Amy Garcia (64-65)							
45.	Cheadle, Joe O				Bob Akins (39-40)					

SA-11

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
46.	Clark, Latossia B.	Daily – store was base store								
47.	Conaway, Diane									(67)
48.	Cooks-Smith, Beatrice M.		(73)		(73)					
49.	Correira, Daniel J.		Anthony Ventura (26) V.Valletta later on (25)		V.Valletta – initially (25) Steve Grant (27) Dennis Donovan (28) Diane Duty (28)	John Cabana (28)				
50.	Corsaro, Candace				(30, 34)					
51.	Cousin, Richie H. Houston, MS	Mike Watson (79)								
52.	Cruz, Enrique		Charles Packer (37) Every 2-3 weeks							

SA-12

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
53.	Cruz, Pansy R.									
54.	Cutchall, Wilma				Willard Green – Once every 4-8 weeks (44, 79) Donna Jordance -- Every 4 to 6 weeks (80)					
55.	Dalton-Goss, Janet									(99)
56	Davis, Lloyd	Richard Hodge (63)								Richard Hodge (63)
57	Day, Richard	3 or 4 a month (122)								
58	Detter, Bill	(177)								
59	Dickerson, Angela	Kevin Kerns (56)								
60	Dinolfo, Carol				Palmer (112)		sometimes only every six weeks (112)			

SA-13

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
61	Dixon, Rebecca	Dan Allen (53-54)			Mike Dixon (53-54) Dave Morgan (54)				Paul Wright (53-54)	
62	Dones, Mareo				Every 4-6 weeks (63)					
63	Duessler, Alice	(29-30) would not estimate								
64	Dunning, Denise Georgetown, SC	Carol Mauldin (72)								
65	DuPont, Sandra Kay		(50)							
66	Edlund, Linda				Ron Fritz (128) Martie Polly (143)				Scott Andrews (143)	
67	Eisenhardt, John				(25-26)					
68	Elam, Rickey	Willie Sands (66)								

S&-14

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
69.	Ellefson, Betty	Vicky (130)			Lana Weicher (131)					
70.	Epstein, David	Ron Coker (46-47) Terry Ricino (65)								
71.	Erwin, Elizabeth	Cullinton – couple times a week (45-46)								
72.	Ethridge, Jodi								(135)	
73.	Fagnani, Al	Connie Ging (35) Tom Belchak (48) Mitch Harris (137)								
74.	Feggins, Lavasier A	Refused to Answer (137-38)								
75.	Fiore, Robert		(30)							
76.	Forler, Larry	(75, 76, 79, 80, 82, 83, 160-162, 174)								

SA-15

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
77.	Fowler, Earl		(16-17)							
78.	Fowlkes, R.C.	(49-50)								
79.	Francis, James P.		(14)							
80.	Freeman, Sue R.	James Duhamel (84)								
81.	Fulton, Brinda	Marcus – Once every week or two weeks (141)								
82.	Gann, Jack	Jack Clement Frank Vogt (65)								
83.	Garza, Rafael		(36)							
84.	Giles, William, R.	Diann Newell (48)	Diann Newell (49)							

SA-16

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
85.	Gondzar, Stanley	Don Whren (45) Don Pickering Bob Petrice (100-01) Pete Naylor (100)			Don Whren (45)					
86.	Gowan, Sherry	Beth Kirby (64)			Ron Coker (63)					
87.	Groothius, Richard St. Louis, MO	Rick Burgstrom (85)[2]								
88.	Guerrero, Nancy		Charles Placker (68-69)							
89.	Guglielmo, Mary			(68-69)						
90.	Gustavus, Sharrian	Brenda Webster (57) Don Youngblood (58) Jerry Monday (97)	Bob Wolfe (97)		Mike Tate Mike Goodwin Bob Russell (58-59)					

[2] DM had office in same building

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
91.	Hahl, James	Mirch Harris							Tom Bolcheck (74-76)	
92.	Hampton, Barbara B.	Target Store (120)								
93.	Hansen, Michelle L.								Jo Ellen McDonald (71)	
94.	Harris, Cora L.								David Geiger (52)	
95.	Harris, Issac T.			Peggy Pedico (81)						
96.	Harrison, Karol		Phyllis Hodge Angie Wolfe Fomest Siegal (68)		John (68)					
97.	Heim, Elden Des Moines, IO	Larry Sprague (71-72)								
98.	Hejl, Leonard				Not as often as I would have liked (104)					

SA-18

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
99.	Hernandez, Jose C. San Antonia, TX									Amy Garcia - 4/5 months Joe Rodriguez (61)
100.	Herrera, Antonia	Ron Coker?			Mark Garris Mike Roessler					Terry Racine
101.	Herriage, Brenda L.		2-3 a month (52)							
102.	Hester, Pamela									(55)
103.	Hill, Magnolia	Bulledge - weekly (32)			Mel Phillips (39)					
104.	Hodge, Calvin	Jack Clements Davis Alfred (38-40)	Lonnie McAffley (38-40)							
105.	Hood, David	Mike Farrell (45)			Mike Farrell (45)					
106.	Houghton, Carla									

SA-19

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
107.	Houston, William									(81)
108.	Hughes, Shelly		Patria Paddock (85-86)							
109.	Hunt, Felicia			Wayne Self (96) Bob Eakins (97)	Al Cork (95)					
110.	Jackson, Clifton Memphis, TN	Marvin Moxley Bob Wolfe (58)								
111.	James, Sharon	Jaine Lopez Frank Vogt (don't remember) (40-41)								
112.	Jertson, James[3] Milwaukee, WI	(35-36)								
113.	Johnson, Michael L.	(126)								

[3] Former DM – As a DM, "at least once a week"

FREQUENCY OF DISTRICT MANAGERS' VISITS

*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
114.	Jones, Gretchen Mryle	Edward Reuve (70-72)								
115.	Jones, Michael D.	Alfred Davis (79)								
116.	Jones, Timothy C.		Ron Coker (43)		Ron Coker (43)					
117.	Kauffman, Marie		Gerald Stimson (44) Mike Greenlees (47)							
118.	Kelley, Mike	Don Reed (Twice a week) (51) Mike Klinepetes (once a week) (51) Larry Lyons (2 or 3 times a week) (54) Wayne Bruno (once or twice a week) (61)								
119.	Kenerson, Sam	(123)								

SA-21

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
120	Kennedy, Ada				Barbara Bohler Shelia Sutton Gary Bailey Jerry Blizzard Bill Taylor (32-33)					
121	Kesterson, Roy	3 times a week (76)								
122	Key, Henritta S				Jerry Bolen – Asst. (47)					
123	Kimsey, Mary	(152)								
124	Knox, Henry	(130)								
125	LaBonte, James	(83-84, 89, 94-95)								
126	Land, Terry	(50, 63-64)								

SA-22

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
127.	Lane, Lori	Frank Venturella (61-62) Nancy Kusky (68)								
128.	Lee, Alvin	James Swanson (143-44)								
129.	Leflore, Patricia D									Tom Edwards (61-62)
130.	Lumley, Mark		(107)							
131.	Maclane, James	Tom Balchak (33-36) Mitch Harris (40)								
132.	Majeski, David Columbus, OH	Bob Smalkowski Tina Rhodes (47)								
133.	Malone, Dorothy M.				Larry Grady (83)					
134.	Mangum, Luther	Kevin Kerns (172)								

SA-23

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
135	Maxwell, Karoline				Ker Peloquin (69)					Jim Hunter (69)
136	McCraney, Tracy		Penny Sledge (65)						Shula Walker (88)	Calvin Watts (81)
137	McDaniel, Chantel		(18)							
138	McElroy, Tammy J.		1 or 2 times a month (71)							
139	McFarland, Donald									
140	McGinnis, John									(165)
141	McGowan, Martha	Donna Jordan (190)								
142	McKenzie, Yolanda				Linda Taylor (47)					

SA-24

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
143.	Meyers, Angela				(50)					
144	Miller, Carmel E.				Pezzalla, Rueve and Laird (40-41)					
145	Miller, John	(31) "Once every one and a half to two weeks"								
146	Mize, Richard Preston Spartanburg, SC				Hardin, Eadis, Young, McGonnell (77)					
147	Moody, Doris	Mitch Harris Tom Balihak (40)								
148	Morgan, Janice R.		Diann Newell (76) Kay Sapnogle (93)							
149	Morris, Charles				(33)					

SA-25

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
150	Muse, Kenneth	Name Unknown (weekly or more) (69-70)			Wayne Bruno (63-64) Lamar Webber (56) Larry Lyons (60-61) Andrew Gibbs (70-71)		Ed Schiller (59)		Wayne Bruno (63-64)	Wes Smith Mike Clempeter (57-58)
151	Myers, David	3 or 4 times per month (49)								
152	Nash, Ethel L. Huntsville, AL									Kay Spanogle (37)
153	Nelson, Carla	1 to 2 a week (24)								
154	Nevins, Lois	(86)								
155	Newberne, Willie	Jim Beasmer (157)			Todd Aike, Jim Craigen, John Dione, Ruth Korndish (80, 85)					Joe Russo (157-58)
156	Notter, Diane K.				Craig Howell Lenay Weichest (100)					

SA-26

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
157	Obasuyi, Winston E.	(152, 186) 3 times a week/ phone daily								
158	Odufuma, Henry O	Bill Scalzo (47)								
159	O'Neal, Paul				Larry Little (114)					
160	Orona, Irenio	(61) Average								
161	Palladino, Paul							(33)		
162	Palmer, Roland				(45)					
163	Papp, Michael									(71-72)
164	Parker, Barbara A		(122-23) three times a month							

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FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
165	Paul, Steven				Ron Wren (53)					
166	Pellegrin, Greg	Mike Kliepenter Mark Garrett (55)								
167	Pendleton, Gary	Keith Police (22)								
168	Perry-Preddie, Veronica								(13)	
169	Pettaway, Gail				Mark Sanner (81)					
170	Pippin, Sheila									Bob Lee (34)
171	Plair, Aqueda				(30)					
172	Potter, Cid		Dennis Treemarchi (59)		Dennis Treemarchi (59)					

SA-28

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
173.	Powell, James G.	Pam Bill (62-64)							George Remington (57) Bob Scheifler (58-59)	
174.	Radosh, Lana				(62)					
175.	Raine, Robin	Robert Mercado (never) (47) – 2 phone calls			Lenay Weichant (61)				Lenay Weichant (61)	
176.	Ralph, Jeffrey		Jim Horton (47-50) Ken Peloquin (69-70)							
177.	Ramos-Correa, Efrain									Ron Venavides Dave Iding (50)
178.	Reed, Trent			Dick Gray (81)						

SA-29

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
179	Reevers, E. Lawrence		Hanford Laird (62) Ron Purdin (67) Peggy Pedigo (67) Travis Kelly (67) David Geiger (73)	Steve Foster (72-73)						
180	Reyes, Carlos	Terry Wunderlick (62) Raymond Rodriquez (67) Mike Rosner (70)								
181	Rhein, Eric Detroit, MI			Rick Smith (76)						
182	Richardson, Barbara J.				Peggy Pedigo (27)				Peggy Pedigo (27)	
183	Robbins, Marcus	Spratlin (73)	Fletcher (46)							

SA-30

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
184.	Robinson, David									Mike Hammock (53) Dan Allen (53) Paul Wright (58)
185.	Robinson, Desiree									
186.	Rodgers, Michelle	Dan Ketterman (80)	Sandy Steele (43) Charlie Carbin (47) Toni Hale (52)							Mike Hammock (51)
187	Rodriquez, Fred	James Wilson (76-77)								
188	Rodriques, Mary L		Tony Wunderlich (41-42)							
189	Rogers, Elizabeth	Bill Faulkner (66)			Bill Faulkner (66)					
190	Rose, Vada									(80-81)

SA-31

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
191	Rosenbeck, Robert	Mike Price (45-46) Dennis Donovan (49)								
192	Ross, Robert				(89)					
193	Sackman, Brenda									
194	Salazar, Beatriz				(65-66)					
195	Sander, James E.	(38) 2-3 times a week								
196	Schmelzle, Anne									(94)
197	Schofield, Thomas			Terry Bryant William Saucier Richard Hoiles (38-39)						

SA-32

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
198	Scrivner, Vickey Jo		Tim Kerce Robert ? Myron Porter Ross ? Al Koch (110)							
199	Shrader, Ansel B.								Kay Spmogle (43, 48, 53-54) Linda Taylor (57)	
200	Sisler, Rodney	(32)								
201	Smallwood, Betsy	Ed Thorwagon (24)		Willie Sands (145-46)						
202	Smith, Cherly	Bill Finch (70) Kevin Godwin (72) Don Roe (76-77)								
203	Smith, Donnie	Mike Sanner (87-88) Mike DeHarea (89) Greg McGill (89-90) Mike Dixon (90)								

SA-33

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
204	Smith, Dorothy J. Huntsville, AL									Kay Spanogle (33-34)
205	Smith, Leona									Terry Wonderlich (90) Steve Pruney (106-07)
206	Smith, Leroy	Larry Fantino (47)	Frank Permatteo (44-45, 47)	Linsa Souza – (45)	*NOTE: This opt-in also has an Assistant DM (48-50)					
207	Smith, Linda D.				Ed Salillen (67) Donald Boyett (67)		Peggy Hall (67)			David Geiger (67-68)
208	Smith, Vivian	Leah Kelly (62)			Arlie Thomas (118) Angie Wolf (119)					
209	Snowberger, Randy				(62)					
210	Spellissy, Marie	Joanne Palmer Charles Wiltshire (97)								
211	Spencer, Sophia J. Cirtonella, AL		Peggy Hall (24)		Peggy Hall (24)					

SA-34

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

SA-35

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
212.	Spruce, David	Ron Shepherd (106)								
213.	St. Hilaire, Theresa	Mike Price (31-32)	Dennis Donovan (44)		Mike Price (41)					
214.	Stanaway, Heather	Lynn Bazinette (30)					Linda Klepadlo (30)			
215.	Stewart, Saundra R		John Bensemer – 3 times a month (113)							
216.	Stockdale, Valerie K									(229)
217	Stoops, Scott		(72)							
218	Stover, Nancy . (Thompson Kidd Tullock)	Early Thomas (50)	Early Thomas (53-54) Angie Wolf (58-59)		Angie Wolf (58-59) Phyllis Hodge (62)				Phyllis Hodge (62)	
219	Stream-Huyck, Shelly	Unable to estimate (53)								

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
220.	Strickland, Mary C.				Peggy Pedigru (41-42, 44)					
221.	Stroud, Rita		Tony Hale (49)	Mike Dixon (48)	Mike Hammock (46)	Dan Patton (45)			Mr. S (47)	
222.	Summerlin, Janet									
223.	Sylvester, Barbara	Lynn Bazzinette (78) Al H. (assistant DM) (68)							Linda Klepadlo (68)	
224.	Tanner, Geraldine				Cal Bryan (76, 77) Richard Hoiles (81)					
225.	Tetley, Regina L.	Amy Garcia (ADM) (93-94)			Gary Web (DM) (100)					
226.	Thornton (Jackson), Glenda A.*									

SA-36

* Unknown 3 year SOL barred

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
227	Trout, Laurie R.				Jill Berm Auburn, NY (40-41		Jill Berm Sodus (33, 73-74)			
228	True, Richard	(40, 97)								
229	Turner, Angela D.	(44)								
230	Turner, James E.		Debbie Aust (89)		Debbie Aust (89)				Bill Finch (89)	
231	Vasquez, Debbie	(100)			(100)					
232	Velazquez, Zenaida		Joe Russo (50)		John Dillon (49)					
233	Vest, Terry A		"once or twice a month"(97)		"once or twice a month" (97)					
234	Vidales, Juan	Jack Lana (50)	Fidel Ramos (52-54)							

SA-37

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
235.	Walker, Pamela E. Georgiana, AL		John Gusmeir & Ed Revu (49-50)							
236.	Walker, Priscilla K				Donald Boyett (95)					
237.	Warren, Charles M.	Howard Leonard -- Every other day (47)								
238.	Washington, Roosevelt		Don Reed (63) Tom Edwards (66)							
239.	Watkins, Roxanne		Ben Sprathn (63) Mark Milner (64)	Willie Sands (63)						
240.	Watson, Duane	(113)								
241.	West, Sr., John W.		Willard Green (56) (Phone calls- - various daily)		Donna Jordan (59)					
242.	Whaley, Birdie Jeanette				Jerry Johns (86)					

SA-38

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS										
Opt-In Plaintiff		Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
243.	Whaley, Cindy								Gary Bailey (45) Barbara Boylen (54)	Gary Bailey (45) Sheila Sutton (50) Jeff Miller (51)
244.	Wildberger, Richard	Frank Venturella (44) Cathy Liggett (72)	Roy Nunnelly (27)							
245.	Wilkins, Melvin		John Hunter (103-04)							
246.	Williams, Bonnie				Joe Eider (129)					
247.	Williams, Jackie Dallas, TX	Keith Police Don Pack (36)								
248.	Williams, Mike		(95)							
249.	Wilson, Gloria	Jim - daily (41-45) other two DMs 3 times per week (42)								

SA-39

FREQUENCY OF DISTRICT MANAGERS' VISITS
*If multiple DM's put name of DM in appropriate box

AVERAGE FREQUENCY OF DISTRICT MANAGER VISITS

	Opt-In Plaintiff	Weekly or More Frequently	Every Two Weeks	Every Three Weeks	Once Per Month	Every Five Weeks	Every Six Weeks	Every Seven Weeks	Once Every Two Months	Once Every Three Months or Less Frequently
250	Woods, Alonzo	Tommy Nix (39-40) Ae Zayed (47-48)								
251	Woods, Brenda C.				Sometimes 2 times (54-55)					
252	Worthington, Jerry Michigan City, IN		"one or twice a month" (51-52) Mark Dollinger							
253	Wright, James	Fletcher Smith (19-20) Afred Davis (148)								
254	Zamarripa, Evangelina	Fidel Ramos (126)	Jack Lane (121)							
255	Zimmerman, Sonja	Frank Ventrella (69) "Chicago" Don (85-87) Rick Fetters (90)			Cathy Liggett (73-74)					

SA-40

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
1	Adams, Bernice	N	N		N	Y	N	N		Y	Y	N		Y	N
2	Alexander, Angela Faye	Y	Y		Y			Y	Y		Y	Y	Y	Y	Y
3	Allen, Krista	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
4	Allende, Ramon	N	N	N	N	N	N	Y	N	N	N	Y	Y	N	N
5	Alston, Catherine	N	N	Y	Y		Y			Y		Y	Y	N	Y
6	Anderson, Brenda	Y	N		Y	Y		Y	Y	Y	Y	Y		N	N
7	Anderson, Carolyn	Y			Y			Y	Y	Y	Y	Y		Y	Y
8	Arrellin, Joe				Y	Y	Y	Y	Y	Y	Y		Y	N	
9	Attaway, Harvey				Y		Y		Y	Y		Y	Y	Y	
10	Avitia, Petra C.	N	N	N	N	N	N		Y	N	Y	N		N	
11	Backus, Cheryl		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
12	Baker, Shirley	N	N	N	N		Y		Y	Y	Y	Y	Y	N	Y
13	Barbe, Suzette	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y		Y	Y

SA-42

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
14	Barber, Delores W.	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
15	Barrentine-Hurley, Mary	N	N	Y	Y		Y	Y	Y	Y	Y	Y	Y	N	Y
16	Beam, Garry				Y	Y	Y	Y	Y	Y	N	Y	Y	Y	
17	Beasley, Ingrid R.	N	N	N	Y	N	N		Y	N	Y	N	Y	N	
18	Bennett, Charles				N	Y	N	Y	Y	Y	Y	Y	Y	Y	
19	Berrios, Porfirio J.	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	
20	Bice, Misty S.	N			Y		N	N	Y	Y	Y	Y	Y	Y	N
21	Blakeney, Julie	Y	Y	Y	Y	Y	Y	Y		Y	Y				Y
22	Bloss, Judy Kay	Y	N		Y	N		Y	Y	Y	Y	Y	Y	Y	Y
23	Bly, Julie	Y			Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
24	Bracey, Katherine B.	N	N	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
25	Brady, Ruby	Y			Y		Y	Y	Y	Y	N		Y	Y	N

SA-43

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
26	Bremer, Tyrus			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
27	Brown, Judy B.	Y	Y	Y	Y				Y	Y	Y	Y	Y	Y	
28	Brown, Shellah E.	Y	N	Y		Y		Y		Y	Y	Y	Y	Y	
29	Brown, Tom	N	N	N	Y	Y	Y	Y	Y	Y	Y		Y	Y	
30	Brown-Owens, Dianne B.	Y		Y				Y	Y	Y	Y	Y	Y	Y	Y
31	Browne, Janet	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
32	Burke, Linda			Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y
33	Butler, Earl E. (Jr.)	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y	
34	Butler, Melanie G.	Y					Y		Y	Y	Y	Y		N	Y
35	Butler, Sharon	N	N	Y	N	Y	Y	Y	Y	Y	Y	Y		Y	
36	Caffey, Tomelita B.	N	N	N								Y	Y	N	Y
37	Cannon, Cora H.	Y		Y		Y			Y	Y	Y	Y	Y	Y	

SA-44

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
38	Cannon, Geraldine	N	N	N	Y			Y	Y	Y	Y	N	Y	N	N
39	Carrera, Josue	Y	Y	Y				Y	Y	Y	Y	Y	Y	Y	
40	Carter, Norman V.	N	N	N	N	N	N	N	N	Y	Y	N	Y	N	N
41	Carter, Robert J.	N	N	N	N	N	N	N	N	N	N	N	Y	Y	Y
42	Casey, Fletu				Y	Y	Y	Y	Y	N	Y	N	Y	Y	N
43	Charles, Gloria S.	Y	Y	Y					Y	Y	Y	Y	Y	N	
44	Chavarria, Maxima	N	N	Y	Y		Y	N	Y	Y	Y	Y	Y	Y	Y
45	Cheadle, Joe O.		Y								Y				
46	Clark, Latossia B.			Y	Y			Y	Y	Y	Y	Y	Y	Y	
47	Conaway, Diane	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
48	Cooks-Smith, Beatrice M.	N	N	N	Y	Y	Y		N	Y	Y	Y		N	
49	Correira, Daniel J.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	

SA-45

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
50	Corsaro, Candace			Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
51	Cousin, Richie H.	N		N	N	N	N				N	Y		N	
52	Cruz, Enrique	Y	Y	Y				Y	Y	Y	Y	Y		Y	
53	Cruz, Pansy R.*														
54	Cutchall, Wilma	N	N	N	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
55	Dalton-Goss, Janet	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
56	Davis, Lloyd	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
57	Day, Richard	N	Y	Y	Y						Y				
58	Detter, Bill	N	N	Y	Y	Y	Y		Y	Y	N	Y	Y	Y	
59	Dickerson, Angela	N	N	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	
60	Dinolfo, Carol	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
61	Dixon, Rebecca	Y	N	Y	Y	Y		Y	Y	Y		Y	Y	N	Y

SA46

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
62	Dones, Mareo	N	N	N	N	Y	Y		N	N		Y	Y	N	N
63	Duessler, Alice	N	N	N	Y	Y	Y	Y			Y		Y	N	
64	Dunning, Denise	N	N	N	N	N	N		N	N	Y	Y	Y	Y	
65	DuPont, Sandra Kay	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
66	Edlund, Linda		Y	Y	Y	Y	Y		Y	Y		Y		Y	Y
67	Eisenhardt, John		Y	Y	Y				Y	Y	Y	Y	Y	Y	Y
68	Elam, Rickey	N			N			N	N	Y	Y	Y		N	
69	Ellefson, Betty	N	N		Y	Y	Y	Y	Y	Y	N	Y	Y	Y	
70	Epstein, David	Y		Y	Y	Y	Y	Y	Y	Y		Y	Y		
71	Erwin, Elizabeth	N		Y	N		N		N	N	Y	N		N	N
72	Ethridge, Jodi	Y	N	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
73	Fagnani, Al	Y	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y

SA-47

MANAGEMENT DUTIES (29 C F R Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
74	Feggins, Lavasier A.	N	N	N	Y	Y	Y	Y			N			N	
75	Fiore, Robert	Y	Y	Y				Y	Y	Y	Y	Y		Y	
76	Forler, Larry	Y		Y	Y		Y	Y	Y	Y	Y	Y	N	Y	Y
77	Fowler, Earl	N	Y	Y	Y			Y	Y	Y	Y			Y	
78	Fowlkes, R.C.	N	N	Y	Y	Y	Y	Y	Y	Y	Y			Y	
79	Francis, James P.	Y			Y	Y	Y	Y	Y	Y	N			Y	
80	Freeman, Sue R.				Y	Y	Y		Y	Y	Y		Y	Y	
81	Fulton, Brinda	N	N	N	Y	Y	Y	N	N	Y	Y	Y		N	Y
82	Gann, Jack		Y	Y	Y				Y	Y	Y	Y	Y	Y	Y
83	Garza, Rafael		Y	Y						Y	Y	Y		Y	
84	Giles, William, R.	Y				Y		Y	Y	Y	Y		Y	N	
85	Gondzar, Stanley			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

SA-48

MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
86	Gowan, Sherry	N	N	N			N	N	N	N	N	N	N	Y	
87	Groothuis, Richard	N	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y
88	Guerrero, Nancy				Y		Y	Y	Y	Y			Y		
89	Guglielmo, Mary	N	N	N	Y	Y	Y		Y	Y	Y	Y		N	Y
90	Gustavus, Sharrian	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
91	Hahl, James	Y		Y		Y	Y	Y	Y	Y		Y	Y	Y	
92	Hampton, Barbara B.	Y	Y					Y	Y	Y	Y	Y	Y	N	
93	Hansen, Michelle L.		Y	Y			Y		Y	Y		Y	Y	Y	
94	Harris, Cora L.				N				N	N	Y				
95	Harris, Issac T.	N	N	N	Y	Y	Y		Y	Y	Y	N		N	N
96	Harrison, Karol		Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
97	Heim, Elden	N	N	N	Y				Y			Y	Y	Y	

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		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
98	Hejl, Leonard	Y	Y	Y	Y			Y	Y	Y	Y	Y		Y	Y
99	Hernandez, Jose C.	Y	Y	Y		Y			Y	Y		Y	Y	Y	
100	Herrera, Antonia	N		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
101	Herriage, Brenda L.	N		Y	Y	N	Y		Y	N	N	N	Y	N	
102	Hester, Pamela	Y		N		Y	Y	Y	Y	Y	Y	Y	Y	N	Y
103	Hill, Magnolia			Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
104	Hodge, Calvin	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
105	Hood, David			Y	Y	Y	Y		Y	Y	Y	Y		Y	Y
106	Houghton, Carla	Y	N	Y	Y	Y		Y	Y	Y	Y			Y	N
107	Houston, William	N		Y					Y	N	Y	N	N	N	N
108	Hughes, Shelly	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
109	Hunt, Felicia	Y	N	N	Y	N	Y		N	N	Y	N		N	N

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
110	Jackson, Clifton								N	Y	Y	Y	Y	N	
111	James, Sharon	Y		Y							Y				Y
112	Jertson, James	N	N		Y	N				Y	N	Y	Y		Y
113	Johnson, Michael L.	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		
114	Jones, Gretchen Mryle	N	N	N	Y		N		N	Y		Y	Y	N	Y
115	Jones, Michael D.	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
116	Jones, Timothy C.	Y	N	Y		Y			Y	Y	Y	Y	Y	N	Y
117	Kauffman, Marie			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
118	Kelley, Mike	Y		Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
119	Kenerson, Sam	N	N	Y	Y	Y		Y	Y	Y	N	Y	Y	Y	
120	Kennedy, Ada	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
121	Kesterson, Roy				Y	Y	Y	Y	Y	Y	Y	N		N	N

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
122	Key, Henrrita S.	N		N					N	N		N	Y	N	
123	Kumsey, Mary	Y	N	N		Y	Y	N	Y	Y	Y	Y	Y	Y	Y
124	Knox, Henry	N	N	Y	Y	N		Y	Y	Y	Y	Y	Y	N	Y
125	LaBonte, James	Y		Y		Y	Y	Y	Y	Y	Y	Y		Y	Y
126	Land, Terry	N	N	N	Y	Y	Y			N	N	N			
127	Lane, Lori		N	N	N	N	N	N	Y	Y	Y	N	Y	N	N
128	Lee, Alvin	N	N	Y	Y	Y	Y		Y	Y	Y	Y		N	Y
129	Leflore, Patricia D.				Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y
130	Lumley, Mark				Y	Y	Y		Y	Y		Y	Y	Y	
131	Maclane, James	Y				Y	Y	Y	Y	N	Y	N	Y		N
132	Majeski, David	N	N	N	N	N	N		N	N	N	N	Y		
133	Malone, Dorothy	Y	Y	Y	N					Y	Y	Y	Y	Y	Y

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
134	Mangum, Luther	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
135	Maxwell, Karoline	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		N	Y
136	McCraney, Tracy	N		Y	Y			Y	Y	Y	Y	Y	Y	Y	Y
137	McDaniel, Chantel	N	N	N	N		N		Y	N	Y	N	N	N	
138	McElroy, Tammy J.		N		Y			N	Y	Y	Y		Y	Y	N
139	McFarland, Donald	Y	Y	Y	Y	Y	Y	Y	Y		N	Y	Y	Y	
140	McGinnis, John	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
141	McGowan, Martha	N	N	N	Y	Y	Y	Y	N		N	N		N	
142	McKenzie, Yolanda				N	N	Y	N	N	Y	Y		Y	N	
143	Meyers, Angela	Y		Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y
144	Miller, Carmel E.	Y		Y				Y	Y	Y	Y	Y		Y	
145	Miller, John				Y	Y			Y	Y	Y	Y		Y	

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend				Did you:							
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
146	Mize, Richard Preston	N	N		Y			Y	Y	Y	Y	Y	Y	Y	
147	Moody, Doris				Y	Y	Y	Y		Y	Y	Y		Y	Y
148	Morgan, Janice R.	Y	Y	Y					Y	Y	Y	Y	Y	N	
149	Morris, Charles	Y	Y	Y				Y	Y	Y	Y	Y	Y	N	N
150	Muse, Kenneth	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
151	Myers, David	N		Y		Y	Y		N	Y	Y	Y	Y	Y	
152	Nash, Ethel I.	N	N		Y		N		Y	Y	Y	Y		Y	
153	Nelson, Carla	Y	N	Y		Y	Y		Y	Y	Y	Y			
154	Nevins, Luis	Y	N	N		Y	Y	Y	Y	Y	Y	Y	Y	N	N
155	Newberne, Willie	N	N		Y	N		Y	Y	Y		N			N
156	Notter, Diane K.				Y	Y	Y	Y	Y	Y	Y		Y	Y	
157	Obasuyi, Winston E.	N		N	Y		Y	N	Y	Y	Y	Y	Y	Y	N

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
158	Odufuma, Henry O.	N	N	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	
159	O'Neal, Paul	N	N	N	Y	Y	N	N	Y	Y	Y	N	Y	N	
160	Orona, Iremio	N	N	N	N	N	Y		Y	Y			Y	Y	
161	Palladino, Paul	Y		Y		Y		N	Y	Y	Y	Y		Y	
162	Palmer, Roland	Y	Y	Y					Y	Y	Y	Y	Y	Y	Y
163	Papp, Michael			Y	Y	Y				Y	Y	Y	Y	Y	Y
164	Parker, Barbara A.		N	Y	Y	N		Y	Y	N	Y	Y	Y	N	
165	Paul, Steven	Y		Y	Y		Y		Y		N	Y	Y	Y	Y
166	Pellegrin, Greg	N	N	Y	Y	N		N	Y	Y	Y	Y	Y	N	
167	Pendleton, Gary	Y	Y	Y				Y	Y	Y	Y			N	
168	Perry-Preddie, Veronica	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
169	Pettaway, Gail	N			Y	Y	Y	Y	Y	N	Y	Y	Y	Y	N

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
170	Pippin, Shelia	N	N	N	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N
171	Plair, Aqueda	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	Y
172	Potter, Cid			Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
173	Powell, James G.	Y				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
174	Radosh, Lana	Y		Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	
175	Raine, Robin	Y		Y	Y			Y	Y	Y	Y	Y	Y	Y	
176	Ralph, Jeffrey	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
177	Ramos-Correa, Efrain	Y		Y		Y			Y	Y	N			N	
178	Reed, Trent	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
179	Reevers, E. Lawrence		N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	
180	Reyes, Carlos				Y	N	Y	Y	Y	Y	Y	Y	Y	Y	N
181	Rhein, Eric	N	N	Y	Y	Y			Y	Y	Y	Y	Y	Y	

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
182	Richardson, Barbara J.	Y	Y		Y	Y		Y	Y	Y	Y	Y	Y	N	
183	Robbins, Marcus	Y		Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y
184	Robinson, David	N	N	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
185	Robinson, Desiree	N		Y	Y	Y	Y		N	Y	Y		Y	Y	N
186	Rodgers, Michelle		Y	Y	N		Y	N	Y	Y	Y	Y	Y	Y	Y
187	Rodriquez, Fred	Y	N	Y	Y	Y			Y	Y	Y	Y	Y	N	
188	Rodriquez, Mary L.	Y	N	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
189	Rogers, Elizubeth	N	N		Y	Y		Y	Y	Y	Y		Y	N	
190	Rose, Vada	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
191	Rosenbeck, Robert		N		Y			Y	Y	Y	Y		Y		N
192	Ross, Robert	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
193	Sackman, Brenda	Y	Y	Y					Y	Y	Y	Y	Y	Y	

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		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
194	Salazar, Beatriz	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
195	Sander, James E.	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
196	Schmelzle, Anne	N	N	Y	N	N			N	Y	Y	Y	Y	Y	Y
197	Schofield, Thomas	N	N	N		Y	Y	Y	Y	N	Y	N	N	N	
198	Scrivner, Vickey Jo				Y		Y	Y		Y			Y	Y	
199	Shrader, Ansel B.				Y	Y	Y		Y	Y	Y	Y	Y	Y	
200	Sisler, Rodney	Y	Y	Y				Y	Y	Y	Y	Y	Y		
201	Smallwood, Betsy	Y	N	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
202	Smith, Cheryl	Y		Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y
203	Smith, Donnie		Y	Y	Y	Y	Y		Y	Y	Y	Y		Y	
204	Smith, Dorothy J.	Y	N	N	Y		Y	Y	Y	Y	N	Y		N	
205	Smith, Leona	N	N	N	Y	Y			Y	Y	Y	Y	Y		Y

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
206	Smith, Leroy	Y	Y	Y		Y	Y		Y	Y		Y	Y	Y	
207	Smith, Linda D.	Y		Y	Y	N		Y	Y	Y	Y	Y	Y	Y	
208	Smith, Vivian	Y			Y	Y	Y		Y	Y	Y		Y	Y	
209	Snowberger, Randy	Y	Y	Y	Y	Y		Y	Y	Y	Y	N	Y	Y	
210	Spellissy, Marie	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y		Y	N
211	Spencer, Sophia J.	Y			Y					Y		Y	Y	Y	Y
212	Spruce, David			Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
213	St. Hilaire, Theresa		N		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N
214	Stunaway, Heather	Y													N
215	Stewart, Saundra R.	Y	Y	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
216	Stockdale, Valerie	Y	N	Y		N			Y	Y	Y	Y	Y	Y	Y
217	Stoops, Scott	Y	Y	Y					Y	Y	Y	Y	Y	Y	Y

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		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
218	Stover, Nancy (Thompson Kidd Tulleck)	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
219	Stream-Huyck, Shelly	Y		Y				Y	Y	Y	Y	Y	Y	Y	
220	Strickland, Mary C.	N	N	Y	Y	Y		N	Y	Y	Y	N	Y	N	Y
221	Stroud, Rita	Y		Y		Y		Y	Y	Y	Y	Y	Y	Y	Y
222	Summerlin, Janet		N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	
223	Sylvester, Barbara	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
224	Tanner, Geraldine	Y	N		Y			Y	Y	Y	Y			Y	Y
225	Tetley, Regina L.				Y				Y						
226	Thornton, Glenda A. (Jackson)										Y			Y	
227	Trout, Laurie R.	Y		Y	Y			Y	Y	Y	Y		Y	Y	
228	True, Richard	N	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
229	Turner, Angela D.	N	N	N	N	N	N	N	N	N	N	N	N	N	

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
230	Turner, James E.	N	N	N	N	N	N	N	Y	Y	N	Y	Y	N	Y
231	Vasquez, Debbie	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
232	Velazquez, Zenaida	N	N	N	N		Y		Y	Y	Y	Y	Y	N	
233	Vest, Terry A.	Y	Y	Y					Y			Y	Y	Y	
234	Vidales, Juan	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
235	Walker, Pamela	Y			Y				Y		Y	Y	Y		Y
236	Walker, Priscilla	N	N	N	Y			N	Y	Y	Y	Y	Y	N	Y
237	Warren, Charles				N	N	N	N	N	Y	Y	Y		N	
238	Washington Roosevelt	Y	Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	Y
239	Watkins, Roxanne			Y	Y	N		Y	Y	Y	Y	Y	Y	Y	Y
240	Watson, Duane	Y	N	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
241	West, Sr., John W.	N	N	N	Y		Y	Y	Y	Y	Y	Y	Y	Y	

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
242	Whaley, Birdie J	Y		Y		Y					Y	Y	Y	Y	
243	Whaley, Cindy	Y				Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
244	Wildberger, Richard	Y			Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
245	Wilkins, Melvin	Y		Y		Y		Y	Y	Y	Y	Y	Y	N	Y
246	Williams, Bonnie		Y	Y	Y			Y	Y	Y	Y	Y	Y	Y	Y
247	Williams, Jackie				Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y
248	Williams, Mike	N	N	Y	Y	Y		Y	Y		Y	Y	Y	Y	
249	Wilson, Gloria	N		N	Y				Y	Y	N			N	
250	Woods, Alonzo	N	N		N	N	N	Y	N	N	N	Y	Y	N	N
251	Woods, Brenda C.	Y		Y		Y			Y	Y	Y	Y	Y	Y	
252	Worthington, Jerry	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
253	Wright, James	N	N	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	N	Y

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MANAGEMENT DUTIES (29 C.F.R. Sec. 541.102)

		Authority to:			Authority to Recommend:				Did you:						
	Opt-In Plaintiff	Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
254	Zamarripa, Evangelina		N	N	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y
255	Zimmerman, Sonja	Y				Y	Y	Y	Y	Y	Y	Y	Y	Y	N

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MO N v. FAMILY DOLLAR

MANAGEMENT DUTIES (29 C.F.R. § 11.102)

	Opt-In Plaintiff	Authority to:			Authority to Recommend:				Did you:						
		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
	Yes	106	51	141	164	143	125	146	206	209	201	188	182	163	109
	No	92	105	52	26	28	21	23	24	23	26	28	6	68	31
	% Yes	54%	33%	73%	86%	84%	86%	86%	90%	90%	89%	87%	97%	71%	78%
	% No	46%	67%	27%	14%	16%	14%	14%	10%	10%	11%	13%	3%	29%	22%
	Totals	198	156	193	190	171	146	169	230	232	227	216	188	231	140

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MANAGEMENT DUTIES (29 C.F.R. § 541.102)

		Authority to:			Authority to Recommend:				Did you:						
Opt-In Plaintiff		Hire	Fire	Discipline	Hire	Fire	Discipline	Promote	Interview	Train	Set or adjust hours of work for store employees	Direct employee work	Maintain production and sales records for use in supervision and control	Appraise employee productivity and efficiency	Plan work
1.	Adams, Bernice	136	137		72-74	92, 95	94-95	76-77		66, 83	86-88	84-86, 120-21		76-77	84-86, 97
2.	Alexander, Angela Faye	59-67	68-69		136			116-17	62-63, 65		84, 73-74	84-86, 88-89	91-92	83-84, 105-07	86, 89, 91
3.	Allen, Krista	93, 125	118, 126	56-57	93	52-53	56-57	73-75	62-64	45-51, 96, 146	64	51-52, 83-90, 100-02	24-25, 131-32	59-61	100-03
4.	Allende, Ramon	55, 68, 70, 102, 130-31	15, 124	122-26, 130	55, 75-76	15, 122-24	122	46-47, 106	69, 70, 80-81	136-37	57-58, 68, 94-96	145-146, 161	181, 187	139-40	55
5.	Alston, Catherine	69-72, 74-75	76-77	81	69-72, 74-75		82			24-26, 51		47, 55-62, 107-08, 123	90-91	101-02	109-10
6.	Anderson, Brenda	182-84	207		182-84	208, 210-15		176-82	183, 189	102, 121-24	191-96, 199-200	120-23		184-87	118
7.	Anderson, Carolyn	43, 47-48, 51-52			47-48, 86			37-38, 94, 105	47-50	83-84, 89	99-102	76-79		103	143-44, 152, 163, 172
8.	Arrellin, Joe				53-55	63-64, 107	55-56	95-96	53, 106	68-69	80-91		22-23, 119-20	91-92	
9.	Attaway, Harvey				55-57		47-50		56	34		85	34-35	52	
10.	Avitia, Petra C.	48-49, 59-60	68	70-73	51-52, 53-59	64-68	70-73, 84		61-63	99	73-75	82-85, 109		100	

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11	Backus Cheryl		59	85-86	119-20	59	85-86	80-81, 119	85	85, 89-90	66	71, 80, 89-90, 117-18	87-88	81-82	117-18
12	Baker, Shirley	41-43, 65-66, 137	91-93, 137, 154-55	137	41-43, 64-66		91-93, 97, 164		41-43, 64	31-32, 102, 118	119-20, 132	49-50, 104, 115, 128-29, 134, 144, 159-60	142-44	43, 90	141-42
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IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTION PRESENTED

Whether collective actions under the Fair Labor Standards Act are categorically prohibited for cases in which an employer raises the executive exemption affirmative defense under 29 U.S.C. § 213(a)(1)?

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STATEMENT OF THE CASE

Family Dollar frankly admits that its petition presents a novel question of first impression in the courts of appeals. Pet. 2. Its insistence that certiorari is nonetheless warranted in the absence of a circuit split — because, it says, the decision below will draw all future collective action litigation to the Eleventh Circuit — is premised upon baseless speculation. Moreover, petitioner's construction of the Fair Labor Standards Act's collective action provision is meritless and has been accepted by no court, district or appellate. To the contrary, courts uniformly understand that collective actions are available, even in exemption cases, so long as the plaintiffs are "similarly situated" with respect to the facts relevant to their claims and the employer's defenses.

Of course, petitioner strenuously disagrees with the concurrent findings of the district court and the court of appeals that the plaintiffs in this case were similarly situated, and invites the Court to review for itself 82 pages of defense exhibits purporting to summarize thousands of pages of deposition testimony. *See* Pet. Supp. App. That invitation betrays the petition for what it really is — a plea for fact-bound error correction masquerading as a request to review a general question of law upon which there is no conflict in the lower courts. The petition should be denied.

I. Statutory Background

1. The Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201 *et seq.*, requires covered employers to pay their workers time-and-a-half overtime wages for all work in excess of forty hours per week. *Id.* § 207(a)(2). This general rule is subject to several exceptions, including the so-called "executive exemption," which excludes from overtime coverage "any employee employed in a bona fide executive . . . capacity." *Id.* § 213(a)(1). As an exception to FLSA liability, the executive exemption operates as an affirmative defense upon which the defendant bears the burden of proof, *see Idaho Sheet Metal Works, Inc. v. Wirtz*, 383 U.S. 190, 209 (1966), and is narrowly construed against the employer, *see Auer v. Robbins*, 519 U.S. 452, 462 (1997).

The Department of Labor has issued regulations elaborating the executive exemption. As relevant here, the regulations provide that the executive exemption extends to any employee:

> [w]ho is compensated on a salary basis at a rate of not less than $250 per week . . . and whose primary duty consists of the management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof, and includes the customary and regular direction of the work of two or more other employees therein . . . .

29 C.F.R. § 541.1(f) (2003).[1]

Factors to consider in determining whether management is a worker's "primary duty" include:

> the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

29 C.F.R. § 541.700(a).

2. Section 216(b) of the Act authorizes an "action to recover" unpaid overtime wages "by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). Unlike traditional class actions, a "collective action" under Section 216(b) includes only those similarly situated individuals who "consent in writing to become such a party." *Id.*

In *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989), this Court held that in appropriate circumstances district courts may facilitate notice to potential opt-in plaintiffs. *Id.* at 169. In subsequent

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[1] A more elaborate test (known as the "long test") applies to workers who earned not less than $150 per week. *Id.* § 541.1(a)-(f) (2003); *see* Pet. App. 70a & n.48. A subsequent version of the regulation was in effect during a portion of the claim period in this case. *See* 29 C.F.R. § 541.100 (2006) (effective Aug. 23, 2004); Pet. App. 71a. Petitioner does not argue that the differences between the two regulations are material. *See* Pet. 28; Pet. App. 80a n.56.

cases, most courts have employed a two-stage procedure for deciding whether to allow a case to proceed to trial as a collective action. Pet. 57a-59a; 7B WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1807 (2005). At the first stage, courts decide whether to "provisionally certify" the collective action, thereby authorizing discovery and other actions to facilitate notice and the gathering of opt-in consents. *Id.* At the second stage, the court decides whether the case may be maintained as a collective action for trial, generally in response to the defendant's motion to "decertify" the action. *Id.*

II. Factual Background

Petitioner operates a chain of small, highly automated dollar stores with a skeletal on-site staff. Each store has a salaried store manager, a non-salaried assistant manager, and one or more hourly employees. Pet. App. 127a. Most of the time, the manager is in the store with only one or two other employees.[2] The store manager, in turn, is overseen by a district manager who is the "head [of] the 'store team.'" Pet. App. 43a (quoting petitioner's operations manual).

Although given a title that implies managerial duties and discretion, "[t]he overwhelming evidence showed that Plaintiff store managers exercise little discretion and spend 80 to 90% of their time

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[2] The company-wide average was 1.43 hourly employees in the store at a time, in addition to the store manager. Doc. 716 at 96-97, 107-108, 121.

performing manual labor tasks, such as stocking shelves, running the cash registers, unloading trucks, and cleaning the parking lots, floors, and bathrooms." Pet. App. 28a. This is because "[a]lmost all of the store manager's job is standardized and controlled by superiors," Pet. App. 36a, and because staffing budgets imposed by corporate headquarters left stores so woefully understaffed that store managers were required do the jobs of the cashiers, stock clerks, and janitors, Pet. App. 35a.

A. Store Managers' Lack Of Managerial Duties

The district court found that "[v]iewed as a whole, the primary duty of the named and opt-in Plaintiffs is non-managerial." Pet. App. 129a. Petitioner's corporate policies ensured that almost all meaningful management decisions were made either by corporate headquarters (often through detailed operational manuals) or by the district managers. Pet. App. 24a, 36a, 43a.

For example, "[s]tore managers lack discretion over the store's merchandise selection, prices, sales promotions, and layouts." Pet. App. 30a. Corporate headquarters decides what products to sell and sets their prices. The company's computers then decide what items to re-order, on what date, and when they will be delivered. Pet. App. 30a-31a n.9. Company manuals — which "apply uniformly to all stores nationwide," Pet. App. 24a — then dictate "(1) where each shelf must be, (2) what product goes on each shelf, (3) how all merchandise is to be displayed, (4) how all signs, merchandising, and display information is to be used, (5) how each "end cap" (the

end of an aisle or gondola) should be displayed, and (6) what promotional product goes on the end cap." Pet. App. 30a.

The day-to-day activities of store employees are likewise governed in detail by corporate policies and the district managers. Corporate headquarters sets store hours and holidays, and requires district manager approval to close the store even in the event of a weather emergency. Pet. App. 48a. The manuals dictate what must be done to prepare the store for opening and what must be done at the end of the day to prepare it for closing, down to who must help clean the store and how the garbage cans are to be emptied. Pet. App. 28a-29a. While the store is open, the manuals govern "[t]he tiniest of details" of store operation, from the handling of money, to the appliances allowed in the employee break room, to the organization of store clip boards and filing cabinets. Pet. App. 30a-31a.

"Even as to the assigned management tasks, such as paperwork, bank deposits, and petty cash, the store manual strictly prescribes them." Pet. App. 28a. Store managers must for example, "follow strict rules regarding store keys, bank deposits [and] petty cash," Pet. App. 32a, and operate in all respects under the constant supervision of the district managers who "uniformly run their stores through strict payroll budgets, to-do lists, daily emails with instructions to store managers, telephone calls, store visits, electronic execution reports, and electronic data flowing from the store's cash register on a real-time basis," Pet. App. 43a.

While store managers are involved in personnel matters to a degree, their power is strictly limited.

The district managers "interview and approve the hiring of assistant managers." Pet. App. 46a. And while store managers may recommend hourly associate candidates for hire, the district manager makes the final hiring decision and is not required to give the store manager's recommendation "any particular weight." Pet. App. 46a, 48a. The district manager then sets all employees' pay rates and must approve any pay increase. Pet. App. 48a. Moreover, it is the district manager — not the store manager — who completes performance evaluations for each hourly worker. Pet. App. 48a. And it is the "district manager — not the store manager — [who] has the authority to terminate employees." Pet. App. 46a.

Nor does the store manager have significant control over workers' hours. The corporate office decides "how many hours a week each employee should work and the total weekly labor hours for the store." Pet. App. 40a. The store managers' authority to alter that schedule is "substantially constrained." Pet. App. 41a. They may not increase a worker's overall hours per week without district manager approval. Pet. App. 41a. And they are absolutely forbidden to authorize overtime. Pet. App. 35a.

So insignificant are store managers' managerial duties that petitioner routinely runs stores without a store manager present, leaving operations in the hands of hourly workers under the supervision of the district manager. *See* R.685-157-159, 163-167.

B. Predominance Of Store Managers' Manual Labor Duties

Although they have no control over the store staffing budget, store managers are required to

ensure that the many daily tasks demanded by corporate policy are completed, even if "the payroll budget does not allocate enough hourly employees to get the job done." Pet. App. 35a. Thus, the "Essential Job Functions" of a store manager, as defined by the official company-wide job description, include working as a cashier or stock clerk "when needed." Pet. App. 25a, 27a. Store managers also must "routinely perform janitorial duties." Pet. App. 29a.

Store managers not only spend the vast majority of their time doing the same work as their hourly subordinates, but they must spend inordinate amounts of time at those tasks. While the company officially schedules store managers to work 52 hour weeks, Pet. App. 40a, in practice managers "routinely work 60 to 70 hours per week and spend 80 to 90% of their time on manual labor," Pet. App. 45a. For this work, they received on average less than $600 per week during the time relevant to this case. Pet. App. 49a.

C. Petitioner's Policy Of Refusing To Pay Overtime To Any Store Manager Or To Examine The Specific Duties Of Individual Workers

Although it emphasizes in this Court that its store managers' entitlement to overtime pay under the FLSA turns on the specific facts of their day-to-day duties, petitioner admits that it has never undertaken to make that individualized determination for any of its managers. Pet. 28; Pet. App. 37a. To the contrary, petitioner's top executives testified that "Family Dollar classified store

managers as executives, across the board, without ever determining how store managers spent their time" and that its "exemption policy did not turn on any individual factors" but was "a company wide decision that applied regardless of store size, location, sales volume, or any other individual factors." Pet. App. 33a-39a.

As a result, petitioner has never paid any of its store managers overtime. Pet. 6. That pattern of uniform treatment led to this litigation.

III. Procedural History

In January 2001, two store managers filed a complaint on behalf of themselves and "all other similarly situated persons" alleging that petitioner was willfully violating the FLSA by failing to pay store mangers overtime compensation. Pet. App. 5a. Petitioner, in response, claimed that all of its store managers fell within the executive exemption. Pet. App. 6a.

A. Provisional Certification

In April 2001, respondents moved the district court to provisionally certify their case as a nationwide collective action to facilitate notice to potential opt-in plaintiffs. Pet. App. 7a. The district court twice denied the motion without prejudice in order to allow further discovery before making its decision. Pet. App. 7a-9a. During that time, petitioner agreed to jointly send opt-in notices to store managers in the seven states where the named plaintiffs had worked. Pet. App. 8a. Respondents received 142 responses and sent each opt-in plaintiff an extensive questionnaire asking about the details

of store operations and their management responsibilities. Pet. App. 9a.

In October 2002, respondents renewed their motion to facilitate nationwide notice based on the completed questionnaires and the results of extensive discovery. After reviewing the accumulated evidence, the district court found that the named plaintiffs and the potential opt-in plaintiffs were similarly situated and that nationwide notice was justified. Pet. App. 134a-139a. Respondents' counsel then sent the authorized notice to more than 12,000 current and former store managers. By March 2003, approximately 2,500 workers had opted in to the case. Pet. App. 11a.

B. Decertification Motion

In May 2004, petitioner moved to decertify the collective action. After reviewing the extensive evidentiary record, the district court denied the motion. Pet. App. 124a-131a.

In its motion, petitioner did not claim, as it does here, that collective actions may never be brought in a case in which the employer's liability turns on an exemption defense. Instead, petitioner argued to the district court that the individualized nature of its defense was one factor, among several, favoring decertification. Relying on the standard initially developed in *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 1987), petitioner argued that "the factors relevant to the stage-two analysis in a FLSA case" were: "(1) the disparate factual and employment settings of the individual plaintiffs, (2) the various defenses available to the defendant that are individual to each plaintiff, and (3) the practical and

procedural fairness of trying the case[s] individually, case by case, as opposed to collectively."[3] With respect to the second factor, petitioner argued only that "highly individualized defenses weigh heavily in favor of decertification,"[4] not that they preclude a collective action as a matter of law.

The district court accepted that *Lusardi* provided the governing legal analysis, *see* Pet. App. 126a, but disagreed with petitioner's view of the facts. With respect to the first factor, the court found that the "evidence confirms that substantial similarities exist in the job duties of the named and opt-in Plaintiffs." Pet. App. 127a. Looking at the facts relevant to petitioner's executive exemption defense, the court found, among other things, that:

- "Although classified as store managers, all of the named and opt-in Plaintiffs lack independent authority to hire, promote, discipline, or terminate assistant managers."
- "Additionally, they all lack the authority to grant pay raises to employees."
- "Nor are the named and opt-in Plaintiffs authorized to change the weekly schedules of the hourly employees in their stores; rather, these schedules are set by the corporate office."

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[3] *See* Defendants' Brief in Support of Its Motion to Decertify the Collective Action, Doc. 250, at p. 7.

[4] *Id.* at 24.

- "Most of the named and opt-in Plaintiffs spend only a small fraction of their time performing managerial duties."
- "They spend the vast majority of their time on essentially non-managerial duties such as unloading trucks, stocking shelves, working as cashiers, and performing janitorial duties."
- "Even some of their managerial functions are shared with nonexempt, hourly employees. These shared functions include ordering merchandise, controlling the keys to the store, opening and closing the store, making bank deposits, approving checks, refunds, and returns."
- "[T]he basic pay rates of the named and opt-in Plaintiffs are also similar."
- "[M]ost (90%) of the named and opt-in Plaintiffs interview and train new employees."
- "Most of them direct the work of the employees in their stores, and maintain production and sales records."

Pet. App. 127a-129a.

The court further found that the "relative time the Plaintiffs spend in performing non-managerial duties *does not significantly differ* from store to store, district to district, or region to region." Pet. App. 129a (emphasis added). "Likewise," the court continued, "the relative importance of the non-managerial duties over the limited number of managerial duties for which the named and opt-in

Plaintiffs were responsible, *did not vary significantly* according to store, region, or district." Pet. App. 129a (emphasis added).

In light of these factual similarities, the court further concluded that petitioner's defenses were not "sufficiently individually tailored to each plaintiff such that a collective action is unmanageable." Pet. App. 130a. For the same reason, the court concluded that collective action proceedings were not unfair to petitioner. Pet. App. 130a-131a.

C. Trial

Trial was held over eight days in 2006.[5] The jury heard from 39 witnesses, including store managers, district managers, corporate executives, payroll officials, and expert witnesses. The jury thus heard testimony from the store managers of 50 different stores, the district managers in charge of more than 130 stores, Family Dollar executives who oversaw 1,400 stores, and an Executive Vice President in charge of all store operations throughout the country. The parties also submitted thousands of pages of manuals, policies, emails, and payroll records. Pet. App. 21a-22a.

After deliberations, the jury returned a verdict in favor of the plaintiffs.[6] The district court entered

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[5] An initial trial in February 2005 ended in a deadlock. Pet. App. 21a.

[6] Separately, the district court entered judgment as a matter of law in favor of 163 plaintiffs who, according to petitioner's own records, were categorically ineligible for exemption under the Department of Labor regulations because

judgment in the amount of the unpaid overtime wages and an equal amount in liquidated damages, as permitted by the Act for willful violations. *See* Pet. App. 51a, 120a-123a.

D. Appeal

On appeal, petitioner challenged, among other things, the district court's rejection of its motion to decertify the collective action. As it had in the district court, petitioner argued that the decertification decision was governed by the three-factor *Lusardi* analysis. *See* Def. C.A. Br. 38. Applying that standard, the Eleventh Circuit found no error in the district court's conclusion that plaintiffs were sufficiently "similarly situated" to warrant collective action treatment.

First, the court found that "ample evidence supports the district court's fact-findings that the Plaintiff store managers were similarly situated under § 216(b)." Pet. App. 62a. It acknowledged petitioner's "assertion that the duties of store managers varied significantly," but concluded that "there was scant evidence to support this argument." Pet. App. 63a. To the contrary, the court found substantial evidence to support the district court's findings that "the opt-in store managers were factually similar in a number of respects," including:

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they did not customarily or regularly direct the work of two or more employees. *See* Pet. App. 89a-90a; 29 C.F.R. § 541.100(a) (2006); 29 C.F.R. § 541.1 (2003). Petitioner does not challenge that ruling here.

> (1) their universal classification as store managers with the same job duties; (2) the small fraction of time they spent on managerial duties; (3) the large amount of time they spent on non-managerial duties such as stocking shelves, running the cash registers, unloading trucks, and performing janitorial work; (4) the restrictions on their power to manage stores as compared to the district manager's sweeping managerial discretion; (5) the amount of close district manager supervision of store managers; (6) the lack of managerial discretion that Family Dollar corporate policies afforded to store managers; (7) their day-to-day responsibilities; (8) their receiving base salaries regardless of the hours worked and no overtime pay; (9) their sharing certain managerial duties with hourly employees; (10) their maintaining production and sales records; (11) their inability to authorize pay raises; (12) their power to train subordinates; (13) their restricted authority to close stores in the event of emergencies; and (14) their inability to select outside vendors without district manager approval.

Pet. App. 62a-63a.

Second, the court held that the fact-specific nature of the exemption defense did not in itself preclude a collective action where, as in this case, the plaintiffs were similarly situated with respect to the relevant facts. "Just because the inquiry is fact-intensive," the court explained, "does not preclude a collective action where plaintiffs share common job

traits." Pet. App. 64a. In this case, the court held, petitioner failed to show that the district court clearly erred in finding respondents similarly situated with respect to its defense. Pet. App. 64a.

Third, the court rejected petitioner's claim that collective litigation was procedurally unfair on the facts of this case. "There is nothing inherently unfair about collectively litigating an affirmative executive-exemption defense where the district court has made well-supported and detailed findings with respect to similarity." Pet. App. 66a.

REASONS FOR DENYING THE WRIT

Although petitioner and its amici complain about a variety of aspects of the trial in this case and the collective action procedures developed by the lower courts — including, for example, the use of a two-stage certification process,[7] the standards employed by courts in making the provisional certification decision,[8] the use of representative testimony at trial,[9] and the substantive standards for evaluating the executive exemption defense[10] — petitioner does not ask this Court to pass upon any such objections here.

Instead, petitioner asks the Court to grant certiorari to decide a narrow question: whether

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[7] *See* DRI Br. 14-15; Nat'l Retail Fed'n Br. 19-23.

[8] *See* Nat'l Retail Fed'n Br. 12-14.

[9] *See* Pet. 12, 29; Chamber Br. 15-18.

[10] *See* Pet. 28-29; Chamber Br. 19-23.

collective actions are categorically precluded whenever a defendant's liability turns on a statutory exemption. Pet. i, 15.[11] No court has ever accepted that view, and there is no reason for this Court to consider petitioner's novel theory in the absence of a circuit conflict.

I. There Is No Circuit Conflict Over The Question Presented.

Certiorari is unwarranted first and foremost because there is no conflict in the circuits regarding the question presented, nor any reason to believe that denying review will prevent other courts from considering petitioner's novel legal theory in the future.

A. Petitioner Acknowledges The Lack Of A Circuit Split.

Petitioner frankly admits that the decision below does not conflict with the decision of any other court

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[11] Petitioner's question presented could be read as asking this Court simply to decide whether a court may allow a collective action when the particular plaintiffs before it are so *differently* situated that each exemption defense must be litigated individually. The answer to that question is plainly "no," and no court (including the Eleventh Circuit here) has held otherwise. Nor is that question presented on the facts of this case, where the court of appeals and the district court both found that the plaintiffs were similarly situated with respect to the facts relevant to petitioner's exemption defense. Pet. App. 61a-69a. To the extent the petition seeks review of that case-specific factual finding, it presents a fact-bound question wholly unworthy of the Court's review.

of appeals. Pet. 2. To the contrary, the circuit decisions that have addressed the standards for allowing cases to proceed as collective actions are in accord, generally approving the three-factor *Lusardi* analysis petitioner advocated, and the courts applied, in this case. *See* Pet. App. 60a, 126a; *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 388-89 & n.17 (3d Cir. 2007); *Anderson v. Cagle's*, 488 F.3d 945, 953 (11th Cir. 2007); *Thiessen v. GE Capital Corp.*, 255 F.3d 1221, 1228, 1230-31 (10th Cir. 2001); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 51-52 (3d Cir. 1989). And under that analysis, rather than being determinative, "the various defenses available to defendant which appear to be individual to each plaintiff" is simply one of several factors to consider. *Thiessen*, 255 F.3d at 1228.

Consequently, *no* court of appeals has ever adopted petitioner's novel contention that exemption cases are categorically ineligible for collective action treatment. Indeed, the decision here is the first to even consider that proposition. That in itself is reason enough to deny the petition.

B. Petitioner Has No Basis For Its Speculation That No Further Percolation Is Likely To Occur.

Petitioner nonetheless urges this Court to abandon its traditional certiorari criteria because, it says, no other court of appeals is likely ever to consider the question presented. This is so, petitioner claims, for two reasons, neither of which withstands scrutiny.

1. Petitioner asserts that courts in other circuits will never hear appeals from certification decisions in

future cases because from now on every collective action suit will be filed in the Eleventh Circuit to take advantage of the decision below. Pet. 15-16. This speculation is baseless.

First, petitioner's argument is premised on the assertion that the Eleventh Circuit has adopted a more "pro-employee precedent" than would be applied in other circuits. Pet. 2. But as shown above, the court here applied the same *Lusardi* analysis approved in every other circuit that has reviewed a decertification decision.

Second, even if plaintiffs *wanted* to bring every collective action in the Eleventh Circuit,[12] in a great many cases they would be unable to do so. Many collective action defendants — including state and local governments[13] or small regional companies[14] —

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[12] This in itself is a doubtful proposition, given the inconvenience and expense of litigating a case far from the named plaintiffs' and their counsel's homes. Nor has the Eleventh Circuit shown itself to be particularly hospitable to collective action claims as a general matter. *See, e.g.*, *Fox v. Tyson Foods, Inc.*, 519 F.3d 1298, 1301-05 (11th Cir. 2008) (affirming district court's denial of certification and motions to intervene); *Anderson*, 488 F.3d at 951-54 (affirming decertification); *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1244-49 (11th Cir. 2003) (refusing to hear workers' decertification appeal after named plaintiff settled own case); *Hipp v. Libert Nat'l Life Ins. Co.*, 252 F.3d 1208, 1244-45 (11th Cir. 2001) (overturning jury verdict in favor of plaintiffs in collective action case); *Haynes v. Singer Co., Inc.*, 696 F.2d 884, 885-87 (11th Cir. 1983) (affirming denial of provisional certification).

[13] *See, e.g.*, *Gonzalez v. City of Deerfield Beach, Fla.*, 549 F.3d 1331 (11th Cir. 2008) (collective action against local fire

operate in only one state or region, and for that reason could not be sued in the Eleventh Circuit. *See, e.g., Aviles v. Kune*, 978 F.2d 201, 203-05 (5th Cir. 1992). Yet these defendants are just as likely to raise exemption defenses, giving the courts of appeals across the nation an opportunity to confront the question presented here.

2. Petitioner next suggests that even if future collective action suits are filed in other circuits, they are unlikely ever to result in another appellate decision.

First, petitioner says, appeals are unlikely because "courts of appeal have uniformly held that § 216(b) certification and decertification decisions are not appealable on an interlocutory basis." Pet. 20. This is only partly true. While certification decisions are not appealable as of right under the collateral order doctrine, district courts may certify them for interlocutory review under 28 U.S.C. § 1292(b), and a number of appellate decisions have come about that

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department); *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132 (2d Cir. 2008) (city hospital); *Archer v. Sullivan County, Tenn.*, Nos. 95-5214 & 95-5215, 1997 WL 720406 (6th Cir. 1997) (local sheriff's department); *Hamilton v. Tulsa County Pub. Facilities Auth.*, 85 F.3d 494 (10th Cir. 1996) (county agency).

[14] *See, e.g., Jonites v. Exelon Corp.*, 522 F.3d 721 (7th Cir. 2008) (regional utility); *Pennington v. Frisch's Rests., Inc.*, 147 Fed. Appx. 463 (6th Cir. 2005) (regional restaurant chain); *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004) (factory in Oregon); *Partlow v. Jewish Orphans' Home of S. Cal., Inc.*, 645 F.2d 757 (9th Cir. 1981) (California charity).

way.[15] Moreover, defendants remain free to appeal certification orders upon final judgment, as petitioner did here.

Petitioner nonetheless insists that certification creates such pressure to settle that few cases will ever reach final judgment, much less a court of appeals. Pet. 22-23. Petitioner provides little to support this assertion. *See id.* (citing solely to a treatise that notes in passing that "most collective actions" — like most civil suits generally — "settle"). In any event, as this case and others demonstrate, numerous employers remain willing to litigate collective action cases to judgment after certification.[16] While petitioner focuses on the asserted pressure to settle large nationwide collective actions, many cases involve only a small number of plaintiffs.[17]

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[15] *See, e.g.*, *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165, 169 (1989); *Ruehl v. Viacom, Inc.*, 500 F.3d 375, 380, 388-90 (3d Cir. 2007); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1093 (3d Cir. 1996); *United States v. Cook*, 795 F.2d 987, 990 (Fed. Cir. 1986); *Dolan v. Project Constr. Corp.*, 725 F.2d 1263, 1265-66 (10th Cir. 1984); *Partlow*, 645 F.2d at 758.

[16] *See, e.g.*, *In re Farmers Ins. Exch.*, 481 F.3d 1119 (9th Cir. 2007) (appeal of collective action judgment after trial); *Smith v. Aztec Well Servicing Co.*, 462 F.3d 1274 (10th Cir. 2006) (same); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001) (same); *Archer*, 1997 WL 720406 (same); *Lockhart*, 879 F.2d at 47 (same).

[17] *See, e.g.*, *Gonzalez*, 549 F.3d at 1332 (collective action of twelve employees); *Walker v. Ryan's Family Steak Houses, Inc.*, 400 F.3d 370, 372-73 (6th Cir. 2005) (twenty-one employees); *Harkins v. Riverboat Servs., Inc.*, 385 F.3d 1099, 1101 (7th Cir.

In addition, plaintiffs may bring class certification questions to the courts of appeals even if defendants do not. As petitioner has shown, a great many collective actions are never certified or are eventually decertified. Pet. 17-18. And plaintiffs as well as defendants are entitled to challenge those decisions either on certified interlocutory appeal or after final judgment.[18]

Thus, while collective action certification issues do not arise regularly in the courts of appeals, it is not because of any insurmountable practical barrier. If the question presented here is as recurring and important as petitioner and its amici claim, then there is every reason to expect that it will be raised again in other circuits.

II. There Is No Basis For Granting Certiorari In The Absence Of A Circuit Split.

Unable to assert a division among the courts of appeals, petitioner is reduced to arguing that certiorari is warranted in light of an asserted conflict between the decision here and a handful of district court opinions, and because of the lack of appellate

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2004) (twenty-one); *Thiessen v. GE Capital Corp.*, 267 F.3d 1095, 1099 (10th Cir. 2001) (twenty-three); *Hipp*, 252 F.3d at 1215 ("over twenty"); *Hamilton*, 85 F.3d at 496 n.2 (four); *Lockhart*, 879 F.2d at 47 (five).

[18] *See, e.g.*, *Anderson*, 488 F.3d at 951-54 (plaintiff appeal from decertification order); *Thiessen*, 267 F.3d at 1099 (same); *Montoya v. Rescue Indus., Inc.*, No. 97-1560, 1999 WL 240247, at *1 (10th Cir. 1999) (unpublished) (same).

guidance in an area of increasing litigation. These arguments are meritless as well.

A. There Is No Conflict Between The Decision In This Case And The Decision Of Any District Court.

Petitioner claims that numerous district courts have rejected the Eleventh Circuit's conclusion that just because an exemption defense is "fact-intensive does not preclude a collective action where plaintiffs share common job traits." Pet. 16-17 (quoting Pet. App. 64a). Instead, petitioner asserts, these district courts "hold that claims over an individualized FLSA exemption cannot be maintained in one collective action." Pet. 17.

Even if this claim were true, it would provide no basis for certiorari. This Court is not in the habit of granting certiorari to resolve conflicts between a court of appeals and the unreviewed decisions of district courts in other circuits.

But in any event, petitioner's asserted conflict is a mirage. None of the cases cited applied a categorical prohibition against collective actions when liability turns on an exemption defense. Instead each court, like the courts here, examined the facts of the case before it to determine whether the particular employees at issue were sufficiently "similarly situated" to warrant collective litigation:

- *Aguirre v. SBC Commc'ns*, No. H-05-3198, 2007 WL 772756, at *12 (S.D. Tex. Mar. 12, 2007) ("The evidence in the record, however, shows that the [plaintiffs] had significant variation in the tasks they are required to perform and the amount of time they spend

on different tasks, but also have significant variation in the amount of discretion each [plaintiff] exercises.");

- *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 578-79 (E.D. La. 2008) ("[T]he evidence of opt-in plaintiffs' job experiences presented at trial . . . reveals substantial variations among the opt-in plaintiffs. . . . Such diversity in individual employment situations inhibits Big Lots from proving its statutory exemption defense . . . .");
- *Smith v. Heartland Auto. Servs.*, 404 F. Supp. 2d 1144, 1152 (D. Minn. 2005) ("The Court . . . finds significant [ ] discrepancies between and among the named plaintiffs and the opt-in class members with respect to a Store Manager's ability to exercise discretion, perform management tasks, and act independently of the district manager.");
- *Reich v. Homier Distrib. Co.*, 362 F. Supp. 2d 1009, 1014 (N.D. Ind. 2005) (denying certification where "all of the potential plaintiffs shared the same position but had differing job duties");
- *Mike v. Safeco Ins. Co. of Am.*, 274 F. Supp. 2d 216, 221 (D. Conn. 2003) (denying certification where the plaintiff's claim did not depend "upon any . . . company policy or decision" but instead only upon the evidence relating to the particular plaintiff's "day-to-day tasks"); *see also id.* at 218 (noting decisions in other cases had "varying results as applied to specific factual scenarios");

- *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498 (D.N.J. 2000) (denying collective action because the "[p]laintiffs have made no showing that the job responsibilities of the named plaintiffs are the same or similar to those of the remaining members of the proposed class");
- *Bayles v. Am. Med. Response of Colo.*, 950 F. Supp. 1053, 1061 (D. Colo. 1996) (denying certification where the "[p]laintiffs vary dramatically in their accounts of whether defendant followed the stated policy"); *id.* at 1062 (describing in detail "several factors [that] are unique to each plaintiff");
- *Reyes v. Tex. EZPawn*, No. V-03-128, 2007 WL 101808, at *5 (S.D. Tex. Jan. 8, 2007) ("As discussed at lengths above, the degree of discretion and authority each [plaintiff] exercised varied depending on store management and store demographics, making this case particularly unsuitable for collective treatment when applying exemption analysis.");
- *King v. West Corp.*, No. 8:04CV318, 2006 WL 118577, at *15 (D. Neb. Jan. 13, 2006) (declining certification where the "differences among [plaintiffs] in terms of managers, team policies and philosophies, client interactions, and factual situations overwhelmingly predominate over their similarities and will require individual inquiry at trial.");

- *Lusardi v. Xerox Corp.*, 118 F.R.D. 351, 361 (D.N.J. 1987) (denying certification because "members of the sample group represent disparate employment situations" and the "differences among the individual plaintiffs are significant not only to plaintiffs' claims but as well to the ability of Xerox to defend against the claims"), *mandamus granted on other grounds*, 855 F.2d 1062 (3d Cir. 1988).

Not only did these courts *not* apply petitioner's categorical rule, a good many of them applied precisely the same three-factor *Lusardi* analysis the district court and court of appeals applied in this case. *See Big Lots Stores*, 561 F. Supp. 2d at 573; *Heartland Auto. Servs.*, 404 F. Supp. 2d at 1150; *Bayles*, 950 F. Supp. at 1066; *Lusardi*, 118 F.R.D. at 370-71.[19]

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[19] There is also no conflict between the decision in this case and the decisions in Family Dollar's favor in *Ward v. Family Dollar Stores, Inc.*, No. 3:06CV441, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008) and *Grace v. Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699 (W.D.N.C. Sept. 7, 2007). The court in both cases simply decided that the plaintiffs there had failed to adequately allege in their pleadings that managers in other stores were similarly situated. *See Grace*, 2007 WL 2669699, at *2 (noting that "there is no allegation that the assignment of the duties was Family Dollar's policy, and therefore applicable to each Plaintiff"); *Ward*, 2008 WL 199699, at *1 (same). In this case — decided on the basis of extensive evidence, not simply the pleadings — the district court found that the assignment of duties was, in fact, governed by Family Dollar's policies. *See* Pet. App. 24a-32a.

The cases petitioner cites thus are consistent with the numerous decisions from other district courts (which petitioner does *not* cite) that have permitted collective actions in exemption cases. *See, e.g., Doornbos v. Pilot Travel Ctrs.*, No. 04CV00044 BEN (BLM), 2005 WL 6166032, at * 3 (S.D. Cal. 2005) ("In spite of the fact-specific nature of the exemption inquiry, courts allow collective action treatment if Plaintiffs can demonstrate that they held identical or similar positions.") (collecting cases); *Scott v. Aetna Servs., Inc.*, 210 F.R.D. 261, 265 (D. Conn. 2002) (noting that "several courts have held that it is appropriate to bring an FLSA exemption claim as a class action with regard to employees who perform similar, but not identical, duties, notwithstanding the highly fact-specific nature of the exemption inquiry" and denying motion to decertify in case before it) (collecting cases).[20]

In the end, district courts reviewing different facts in exemption cases have sometimes found workers "similarly situated" and sometimes not. But none has adopted petitioner's categorical rule in conflict with the decision here.

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[20] *See also Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2009 WL 790107, at *4-*9 (M.D. Tenn. Mar. 24, 2009) (denying motion to decertify in exemption case); *Nerland v. Caribou Coffee Co., Inc.*, 564 F. Supp. 2d 1010, 1018-26 (D. Minn. 2007) (same); *Wilks v. Pep Boys*, No. 3:02-0837, 2006 WL 2821700, at *7 (M.D. Tenn. Sept. 26, 2006) (same), *aff'd on other grounds*, 278 Fed. Appx. 488 (6th Cir. 2008); *Moss v. Crawford & Co.*, 201 F.R.D. 398, 410-11 (W.D. Pa. 2000) (same).

B. Certiorari Is Not Warranted To Short-Circuit Ventilation In The Lower Courts In The Name Of Providing "Appellate Guidance."

Attempting to convert a vice into a virtue, petitioner argues that the very lack of circuit precedent that prevents it from asserting a circuit conflict is a reason to grant certiorari to fill a gap in "appellate guidance," Pet. 24, in an area of increasing litigation, Pet. 30.

This reasoning has it completely backwards. The fact that certification questions are not regularly decided on appeal suggests that the petition fails to present an issue of recurring importance, not that the Court should reach out to decide a novel question before it has been ventilated in the courts of appeals. And the fact that collective actions are increasing is a reason to believe that if there is need for appellate guidance, it should be forthcoming from the courts of appeals without intervention by this Court.

Ironically, petitioner acknowledges that even "[w]ithout any appellate guidance," the district courts are moving toward consensus on an approach to resolve certification questions. Pet. 24-25. Nonetheless, petitioner insists that this Court's immediate intervention is required because that consensus, in its view, is headed in the wrong direction, with courts "refus[ing] to adopt a precise definition of what 'similarly situated' means." Pet. 28. That is no reason to grant certiorari and is untrue in any event. While the multi-factor *Lusardi* analysis petitioner embraced below may not dictate results with mathematical precision, it nonetheless

provides significant guidance, as demonstrated by the lengthy and careful decisions by the district court and court of appeals in this case. *See* Pet. App. 61a-69a, 125a-139a. Moreover, the *Lusardi* approach is no more indeterminate than other analyses this Court has developed to elaborate legal concepts that defy distillation into a simple test. *See, e.g., Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (holding, without further explication, that individual could show Equal Protection violation by establishing that "she has been intentionally treated differently from others *similarly situated* and that there is no rational basis for the difference in treatment") (emphasis added).[21] And in any event, petitioner does not offer any more precise definition of its own. Instead, it simply asks this Court to declare what "similarly situated" does *not* include, namely actions involving exemption defenses.

Amicus DRI, on the other hand, urges this Court to import the legal standards governing class actions under either the current (or perhaps the superseded) version of Rule 23 of the Federal Rules of Civil Procedure. *See* DRI Br. 8, 10-13. Petitioner has not made this argument, either in its petition or to the Eleventh Circuit, and the courts of appeals have uniformly declined to accept it. *See Thiessen*, 255 F.3d at 1230-31; *Grayson*, 79 F.3d at 1096 n.12. In any case, DRI makes no effort to explain how the

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[21] *See also, e.g., Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) (noting that in context of regulatory takings claims, the Court has adopted an "essentially ad hoc" approach that takes into account "several factors").

standards for certification under Rule 23 are different from, or more precise than, the standard applied in this case. *See* DRI Br. 12 (noting only that Rule 23 requires adequate representation and "common question[s] of law or fact"); *Thiessen*, 255 F.3d at 1231 (concluding that "there is little difference in the various approaches"). Nor can DRI credibly claim that any purported difference would change the result in this case.

In fact, DRI seems mostly interested in having the Court rely on Rule 23 to reject the two-stage certification approach adopted by most courts. *See* DRI Br. 14-15; *see also* Nat'l Retail Fed'n Br. 19-23. But that objection falls outside the scope of the Question Presented, is not made in the petition, and was not pressed or passed upon below.[22] Thus, if anything, amici's briefs provide an additional reason to deny certiorari here and await a case presenting the issues and arguments that seem to be the real concern for businesses facing collective action litigation.

III. The Decision Below Is Correct.

Finally, certiorari is unwarranted because the court of appeals correctly rejected petitioner's novel interpretation of Section 216(b) and did not err in

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[22] In the court of appeals, petitioner did not raise any challenge to the two-stage process or to the district court's provisional certification decision. *See* Def. C.A. Br. 1 (Statement of Issues) (asking court to do decide only "Did the District Court err in *refusing to decertify* this FLSA collective action . . . ?") (emphasis added).

affirming the district court's certification decision on the facts of this case.

A. The FLSA Permits Collective Actions In Exemption Cases When, As Here, The Plaintiffs Are "Similarly Situated" With Respect To The Defense.

Nothing in the language or history of Section 216(b) supports categorically excluding exemption cases from its purview. Section 216(b) provides that "[a]n action to recover the liability prescribed [by the Act] may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b). This encompassing language includes *all* actions for overtime violations, and admits of no exclusion except for cases in which the employees are not, in fact, "similarly situated."

Had Congress believed, as petitioner does, that exemption cases are so *inherently* individualized that collective actions are *never* appropriate, it presumably would have made that clear by carving out exemption cases in the text of the statute. Congress's failure to do so cannot have been an oversight. Congress surely was aware that much of the litigation authorized by the statute would involve exemption defenses. As demonstrated in this case, the plaintiff's case-in-chief will rarely be the focus of minimum wage or overtime litigation, turning as it does on facts ordinarily not subject to genuine dispute. *See* Pet. App. 97a & n.68. Accordingly, the vast majority of actual FLSA litigation involves the kinds of exemption defenses petitioner says cannot be resolved in collective actions. Yet if Congress did not

intend collective actions to play a meaningful role in FLSA litigation, it presumably would have simply eliminated them altogether.

Nor is there anything inherent in the term "similarly situated" that necessarily precludes all collective actions in exemption cases. As the court of appeals noted, even fact-intensive legal tests can be applied collectively when the material facts of each case are substantially similar. Even petitioner must admit that if two or more employees are *identically* situated in every respect material to an employer's exemption defense, then trying the cases together would not prejudice the employer and would result in substantial efficiencies. The fact that Congress enacted a "similarly situated" rather than an "identically situated" standard reflects that Congress did not intend to limit collective actions to the rare (perhaps nonexistent) cases in which there was no variation at all among employees.

Of course, deciding whether a group of plaintiffs is similarly situated *enough* to warrant collective action treatment in a particular case may sometimes require tough judgment calls. But that is no reason to substitute judge-made categorical rules for a congressionally-mandated flexible standard.

B. Petitioner's Objections To The Application Of The "Similarly Situated" Requirement To The Specific Facts Of This Case Are Meritless And Do Not Warrant Review.

Finally, petitioner objects to the district court's conclusion, based on its view of the evidence, that the plaintiffs were "similarly situated" in this case. But

that disagreement about the proper view of the evidence and the facts of this particular case is no basis for certiorari. And, in any event, petitioner's fact-bound challenge to the district court's findings is meritless.

1. The court of appeals held — and petitioner does not dispute here — that the district court's certification decision is reviewed for abuse of discretion and its finding that the plaintiffs were similarly situated is subject to reversal only for clear error. Pet. App. 61a, 64a. As described in the court of appeals' meticulous opinion, petitioner's own actions — its corporate policies, its micromanaging operational manuals, and its division of responsibilities between store managers and district managers — generated a fundamental similarity among its store managers with respect to the aspects of their jobs material to their claims and petitioner's defenses. *See* Pet. App. 61a-69a.

To be sure, petitioner presented the district court with various charts purporting to demonstrate a degree of variation in plaintiffs' deposition testimony regarding a handful of relevant duties. *See* Pet. 26-27. At the same time, however, respondents contested the charts' accuracy and submitted their own summary exhibits. *See* Pet. App. 65a n.44. On appeal, the Eleventh Circuit agreed that petitioner's charts were misleading and held that the district court was not required to accept their accuracy. Pet. App. 65a n.44.

In addition, petitioner's charts were badly incomplete. Although the pertinent regulation lists more than twenty management activities to consider, 29 C.F.R. § 541.102, defense counsel cherry picked

only a few to summarize in their charts. Pet. App. 65a n.44. As a result, the charts said nothing to undermine the district court's conclusion that although store managers may perform some management activities, "[v]iewed as a whole, the primary duty of the named and opt-in Plaintiffs is non-managerial." Pet. App. 129a. Because the "primary duty" element is a prerequisite for the successful assertion of an executive exemption defense, any variation in the *kinds* of management activities respondents occasionally undertook was ultimately immaterial. *See* 29 C.F.R. § 541.700(a).

2. Petitioner also asserts that the court of appeals held that "none of the factual differences among the Plaintiffs mattered because Family Dollar had decided to classify its store managers as exempt across the board." Pet. 28. This is simply untrue.

To be sure, in response to petitioner's complaint that collective litigation would be unfair, the court of appeals noted that petitioner itself seemed to believe that all of its store managers were similarly situated for purposes of their entitlement to overtime compensation; otherwise its decision to deny overtime across the board would show a blatant disregard for the requirements of federal law. Pet. App. 66a. But the court made clear that it did not rely on that fact to ignore otherwise material differences among employees. To the contrary, the court explained that there was "nothing unfair about litigating a single corporate decision in a single collective action, *especially where there is robust evidence that store managers perform uniform, cookie-cutter tasks mandated by a one-size-fits-all corporate manual.*"

Pet. App. 66a-67a (emphasis added). And the court expressly acknowledged that

> Just because a business classifies all employees in a particular job category as exempt does not mean that those employees are necessarily 'similarly situated' for purposes of a 29 U.S.C. § 216(b) collective action. Rather, it is necessary to review the actual job duties of those in that job category to determine whether they are similarly situated and whether the exemption defense can be collectively litigated.

Pet. App. 67a n.46.

Thus, the district court's denial of decertification was affirmed not simply because of petitioner's universal classification decision, but also because the district court found that respondents were similarly situated with respect to their actual job duties. *See* Pet. App. 69a.

3. Petitioner's objection to the use of representative testimony, *see* Pet. 12, 29, is both entirely unrelated to the questions presented — which asks *whether* a collective action was permitted, not *how* it should have been tried — and meritless.

Petitioner states that liability was established on the basis of the testimony of "a few Plaintiffs handpicked by Plaintiffs' counsel" and that "[o]nly 7 Plaintiffs . . . testified live" at trial, Pet. 12, giving the impression that the defense was unable to call witnesses of its own choosing to establish its executive exemption affirmative defense. Any such impression is false.

First, respondents did not use representative testimony to prove their case. In fact, petitioner stipulated to the elements of respondents' case-in-chief, which were proven, in any event, by petitioner's own records. Pet. App. 97a.

Second, although petitioner complains about the amount of testimony from the plaintiffs, it actually *opposed* petitioner's motion to submit the deposition testimony of 238 opt-in plaintiffs petitioner had deposed before trial. Pet. App. 98a-99a. This included the testimony of Krista Allen upon which petitioner now attempts to rely. *See* Pet. 9.

Third, petitioner was not limited to relying upon the testimony of seven plaintiffs, "handpicked by Plaintiffs' counsel," to establish its exemption defense. Of course, respondents chose their own witnesses in presenting their case-in-chief. That is hardly surprising. But when the plaintiffs rested, petitioner was allowed to choose its own additional witnesses to establish its defense. In fact, petitioner called a number of the plaintiffs to the stand, as well as other non-plaintiff store managers, district managers, company executives, and experts.[23] And it could have called many more. "Although Family Dollar itself had the opportunity to present a great deal more testimony from Plaintiff store managers, or its own district managers, it chose not to." Pet. App. 100a-101a. For whatever reason, petitioner chose to

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[23] *See* Doc. 715 at 156-237; Doc. 716 at 4-305; Doc. 717 at 4-318; Doc 718 at 66-113. In addition, petitioner submitted the deposition testimony of twelve more opt-in plaintiffs. *See* Pet. App. 98a.

use "only 10 of its allotted 40 hours for its defense, even though it bore the burden of proving the executive exemption defense." Pet. App. 101a.

4. Finally, petitioner's concluding plea for review in light of the "devastating" financial consequences of its loss in this particular case, Pet. 32, is difficult to take seriously.

Even though it insists that its store managers' entitlement to overtime pay must be considered on an individual basis, petitioner acknowledges that it has been denying overtime compensation to each and every one of its store managers for many years. Pet. 6. During that time, petitioner has illegally retained hundreds of millions of dollars, only a small portion of which was disgorged by the verdict in this case.[24]

Moreover, even while acknowledging that its policy necessarily resulted in systematic violations of federal law,[25] petitioner makes no apologies. *See* Pet.

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[24] Even with its liquidated damages provision, FLSA's three year statute of limitations provision effectively limited the judgment to the equivalent of six years' of unpaid overtime for the opt-in plaintiffs. *See* 29 U.S.C. §§ 216(b), 255(a). Given that less than twelve percent of those sent notices opted into the case and received damages, *see* Pet. App. 11a (12,145 notices sent); Pet. App. 15a n.5 (claims of 1,424 workers tried), the judgment effectively requires petitioner to give up less than nine months' worth of unpaid overtime. And even that estimate is generous to petitioner. *See* Pet. App. 52a & n.34.

[25] *See* Pet. 31 (admitting that "there are some who were likely misclassified"). If this were not so — if petitioner agreed that either all or none of respondents were entitled to overtime — then it would have no grounds to complain that the case was tried as a collective action.

28 (insisting that "[a]s a practical matter, businesses do not make exemption classification decisions employee by employee"). Instead, petitioner seems to take the position that it is entitled to adopt a policy it knows will result in the persistent violation of workers' FLSA rights, secure in the knowledge that the millions of dollars saved over time can be claimed by workers only through individual actions for relatively small amounts of money.

That is precisely the set of perverse incentives Congress intended the FLSA's collective action provision to avoid. Its use in this case was consistent with the terms and purposes of the statute, as well as the decisions of other courts.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 08-1287

IN THE
Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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RULE 29.6 STATEMENT

Family Dollar's Rule 29.6 statement is contained in the petition. Pet. ii. There have been no changes.

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Respondents' brief in opposition does not answer the powerful arguments for certiorari raised by the petition. Although this case does not present a standard-run circuit split, it presents an extraordinarily important procedural issue that has generated widespread uncertainty among lower courts and that has enormous impact on complex litigation. The Eleventh Circuit's decision sets too lax a certification standard under 29 U.S.C. § 216(b) and, as a result, it will become a haven for nationwide FLSA collective actions. This Court should intervene.

1. Family Dollar and the *amici* have predicted that the Eleventh Circuit will become the forum of choice for nationwide collective actions. *See* Pet. at 21–22; Chamber Br. 10–11, 18–23; DRI Br. 3–4, 18–20. Rather than answer this argument, Respondents call it baseless "speculation." Opp'n 18–20. The statistics show otherwise.

In general terms, the impact of collective actions under the FLSA is big and getting bigger. The Federal Judicial Center's recent study of class actions found the increase in FLSA collective actions "striking, "both in absolute numbers and as a proportion of all class action activity in the federal courts." Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts* 3 (Fed. Judicial Ctr. April 2008). The study found that "[i]n absolute numbers, labor class actions increased from 337 in the [July–December 2001] period to 1,104 in the [January–June 2007] period—a 228 percent increase." *Id.* Collective actions increased from "almost one-quarter of all class actions identified, 24.6 percent,"

in 2001, to "almost one-half of all class actions identified, 46.9 percent," in 2007. *Id.* at 4. As the Federal Judicial Center observed, "these are remarkable trends." *Id.*

Statistics also show a disproportionate increase of FLSA cases within the Eleventh Circuit. Although the Administrative Office of the Federal Courts does not publish caseload data isolating FLSA cases, statistics on the general category of "Private Labor Suits" (which includes FLSA cases) show the Eleventh Circuit has almost twice as many of these suits commenced and pending than the next closest circuit, the Ninth Circuit (which has nearly three times the Eleventh Circuit's population). *See* Administrative Office of the Federal Courts, *2008 Annual Report* 149–60 (Tables C-3 & C-3A); Administrative Office of the Federal Courts, *2007 Annual Report* 151–62 (Tables C-3 & C-3A).[1] For instance, 2007 caseload statistics show that 5,570 cases were commenced within the Eleventh Circuit, which amounts to over 30 percent of the 18,233 total cases filed. The Ninth Circuit came in second, with 2,294 cases filed, only 12 percent. RA-1, 19.

There is no evidence that this trend will stop. The Eleventh Circuit issued its opinion in this case in late December 2008. Pet. App. 1a. The Eleventh Circuit contains 11 percent of the nation's population (WORLD ALMANAC 589 (2009)), and its district courts share about the same percentage of the federal civil caseload. *See* RA-3, 7 (23,119 of 223,093 private cases in 2008).

[1] Charts of the caseload statistics are included in the Reply Appendix at RA-1. The referenced tables follow at RA-2–25.

Yet from January 1 to June 30, 2009, **40 percent** of all FLSA cases filed were filed in district courts within the Eleventh Circuit.[2]

District	2009 Filings	Percentage
DC	13	0.424%
1st	33	1.077%
2nd	359	11.720%
3rd	167	5.452%
4th	154	5.028%
5th	357	11.655%
6th	149	4.864%
7th	179	5.844%
8th	76	2.481%
9th	243	7.933%
10th	119	3.885%
11th	**1,214**	**39.634%**
Total Filings	3,063	100.000%

In the six months since the Eleventh Circuit's decision, nearly **1,000** more FLSA cases were filed within the Eleventh Circuit than in any other circuit. These statistics cannot be easily dismissed.

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[2] The source for these statistics are reports generated by Monitor Suite, proprietary software (run by Thomson Reuters) that can track district court filings according to the categories listed on the civil cover sheet. The code for FLSA cases is 710. The reports are included at RA 26–73.

2. Respondents claim that the question presented, as framed by Family Dollar, is a "categorical" argument that was not raised or litigated below. Opp'n i, 10–11, 14, 16–18. The record refutes this claim. All the arguments presented in the petition were litigated and decided in the district court and the court of appeals. The question presented focuses on the individualized nature of the FLSA's executive exemption—as a matter of fact and law. Pet. i. Family Dollar argues that certification was improper *both* because of the facts presented at decertification *and* the legal requirement that the executive exemption be decided "on a case-by-case basis" (29 C.F.R. § 541.106(a) (2006)). Pet. 26–29. These issues were litigated at every stage and decided below. *See* Doc. 250 at 7–24; Pet. App. 126a–30a; 11th Cir. Br. 39–45; 11th Cir. Reply 6–12; Pet. App. 62a–65a. The question presented also includes whether adjudicating the executive exemption in a collective action is superior to individual litigation and whether such an action can be manageably and fairly tried in one collective jury trial. Pet. 29–32. Both the District Court and the Eleventh Circuit addressed these questions raised by Family Dollar. *See* Doc. 250 at 25–29; Pet. App. 130a–31a; 11th Cir. Br. 46–49; Pet. App. 65a–69a. These questions encompass not only the due process limits on certification of a § 216(b) collective action (Pet. 29), but also DRI's *amicus* argument that Rule 23 principles should apply to this statutory procedure (DRI Br. 7–13). Family Dollar also raised these questions and arguments at every stage. *See* Doc. 250 at 27–28 (citing Rule 23 decisions by analogy), 29 (due process); Pet. App. 131a (decertification opinion rejecting due process argument); 11th Cir. Br. 48–49 (Rule 23 decisions), 54–57 (due process); 11th Cir. Reply Br. 5 (Rule 23 decisions), 12–13 (due process).

The question presented fairly encompasses all the arguments raised in the petition (and those of the *amici*). Family Dollar preserved all of these arguments for review by this Court. *See Nelson v. Adams USA*, 529 U.S. 460, 469 (2000) (certiorari "does not demand the incantation of particular words; rather, it requires that the lower court be fairly put on notice as to the substance of the issue."); *Harris Trust & Sav. Bank v. Salomon Smith Barney*, 530 U.S. 238, 245 n.2 (2000) ("Once a federal claim is properly presented, a party can make any argument in support of that claim.") (internal quotation and citation omitted); *United States v. Williams*, 504 U.S. 36, 44 (1992) (a party need not "demand overruling of a squarely applicable, recent circuit precedent" as a precondition "to our granting certiorari upon an issue decided by a lower court").

3. The question presented is certworthy notwithstanding the absence of a traditional circuit split. The Eleventh Circuit's decision conflicts with numerous lower court decisions holding that § 216(b) cannot be used to certify a collective action where each plaintiff's duties must be examined individually to determine whether an exemption applies. Pet. 16–18. The few published circuit decisions that exist fail to meaningfully engage the language of § 216(b). Instead, they (like the Eleventh Circuit) have adopted an *ad hoc* analysis that assures *ad hoc* results. This has caused widespread confusion among the district courts. The Chamber of Commerce's *amicus* brief lists nearly 100 district court cases complaining about the lack of direction from the appellate courts. Chamber Br. 3 & App. The few cases Respondents cite in support of the Eleventh Circuit's decision (Opp'n 27 & n.20) only underscore how wide

the split of authority is in the lower courts. Perhaps most tellingly, Family Dollar itself has suffered inconsistent outcomes within two different circuits on the exact same procedural issue. *Compare Grace v. Family Dollar Stores*, 2007 WL 2669699, *3 (W.D.N.C. Sept. 6, 2007) ("A collective action is never appropriate for situations where a court must make an individual determination of each plaintiff's day-to-day activities.").[3]

The paucity of circuit decisions addressing § 216(b) procedure in the 71 years since Congress enacted the FLSA shows how infrequently this issue receives appellate review. Without interlocutory review available to appeal § 216(b) certification decisions, the issue almost never reaches the appellate courts.[4] The litigation against Family Dollar illustrates why. If the district court denies certification of a collective action, the plaintiffs are more likely to file suit elsewhere, not appeal. Losing defendants, by contrast, cannot immediately appeal § 216(b) certification. Pet. 20 (collecting cases). An interlocutory appeal of either decision via 28 U.S.C. § 1292(b) is purely discretionary. Although they now laud § 1292(b) (Opp'n 20–21), Respondents *in this case* defeated Family Dollar's motion for § 1292(b) certification by arguing that the

[3] The district court in *Grace* recently granted Family Dollar summary judgment on the executive exemption. *See Grace v. Family Dollar Stores*, No. 3:08 MD 1932 (W.D.N.C. July 9, 2009) (Doc. 172).

[4] This phenomenon also hindered the development of meaningful standards under Rule 23 until Rule 23(f) was adopted. *See* FED. R. CIV. P. 23, advisory committee notes to 1998 Amendments.

certification question was purely factual and that appellate review of this procedural issue would not lead to "the ultimate termination of the litigation." Doc. 377 at 1–6. And mandamus review is extraordinary, as the Eleventh Circuit's denial of Family Dollar's pretrial mandamus petition in this case (Doc. 398) shows.

This case thus presents the Court the rare opportunity to review certification of an FLSA collective action. As the *amici* have shown, this case presents the ideal vehicle to decide what standards should govern § 216(b) certification. Nat'l Retail Fed'n Br. 2–7; DRI Br. 13–15; Chamber Br. at 6–11. Family Dollar has withstood enormous pressure to litigate this case to a multi-million-dollar judgment and appeal the issue all the way up to this Court. Retailers facing similar litigation in the future may not have the wherewithal to bring the issue here.

Given the significance of § 216(b) to federal class litigation, the conflicting results reached in similar cases in the lower courts, and the barriers to regular appellate review, this Court's intervention is warranted. *See Heffron v. Int'l Soc. for Krishna Consciousness*, 452 U.S. 640, 646 & n.9 (1981); *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344, 349 & n.2 (1999).

4. The decision below is wrong. The Eleventh Circuit's holding that a collective action may be certified "where plaintiffs share common job traits" (Pet App. 64a) sets far too lax a standard for such a powerful class device. The Eleventh Circuit's use of Family Dollar's uniform classification of all store managers as exempt to justify § 216(b) certification compounded the court's

error. *See* Pet. App. 63a–69a. That justification is not only out of touch with business realities, it is in serious tension with two recent Ninth Circuit decisions holding that an employer's uniform classification decision could not justify certification of a Rule 23(b)(3) class action due to the predominance of individual exemption issues. *In re Wells Fargo Home Mortgage Overtime Pay Litigation*, __ F.3d __, 2009 WL 1927711 (9th Cir. July 7, 2009); *Vinole v. Countrywide Home Loans*, __ F.3d __, 2009 WL 1926444 (9th Cir. July 7, 2009).[5]

The Eleventh Circuit's decision also threatens the national retail business model. Most nationwide retailers use the same structure to manage stores spread across the country. Each store has a store manager who protects the money on hand, ensures the inventory is not shoplifted or stolen by the employees, responds to emergencies, and supervises the employees on a daily basis. A remote district manager overseeing the operations of dozens of stores cannot do any of this. The need for someone in charge of each freestanding store explains why virtually every retailer classifies its store managers as exempt and pays them a salary. Yet that uniform classification decision—which makes good business sense—now makes every retailer vulnerable to nationwide collective actions. Although small mom-and-pop retailers may be immune, every national retailer with a presence in Alabama, Florida, or Georgia will be subject to high-stakes litigation if the Eleventh Circuit's decision stands.

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[5] *Wells Fargo* and *Vinole* were diversity cases under California's wage and hour laws, so Rule 23, not § 216(b), governed those class actions.

5. Finally, Respondents misconstrue the factual record. Drawing on the representative evidence presented at *trial* (which the Eleventh Circuit viewed in the light most favorable to the plaintiffs), Respondents have portrayed Family Dollar store managers as monolithic. *See* Opp'n 4–16. But the issue is whether this case should have been decertified before trial. The record for this issue is the evidence Family Dollar presented at the decertification stage. That factual record shows substantial divergence among the Plaintiffs on the management duties that determine the executive exemption. Family Dollar has given the Court the charts of the 255 depositions it was allowed to take. SA-6–40; SA-42–64. Those charts did not "cherry pick" (Opp'n 33–34) the relevant management duties. Comparing the 14 column headings (SA-42) with 29 C.F.R. § 541.102(b) (2003) and *id.* § 541.102 (2006) shows that the charts covered virtually all the duties the FLSA regulations use to define "management." The charts also refute any suggestion that the Plaintiffs are "similarly situated."

Rather than respond to the decertification evidence, Respondents falsely claim that the Eleventh Circuit found Family Dollar's charts "misleading." Opp'n 33. It did no such thing. Although full transcripts of all 255 depositions were in the record (Doc. 230) and Family Dollar included deposition page references for every answer charted (SA-66–82), the court merely quibbled with three of the chart's 3,570 cells based on one plaintiff's deposition. Pet. App. 65a n.44. The court did not dispute the deeply inconsistent testimony given by 255 plaintiffs on their managerial duties.

In a last-ditch effort to avoid the decertification record, Respondents return to the evidence at trial and claim that Family Dollar should have called more witnesses to prove its exemption defense. Opp'n 36. This ignores the fundamental procedural error at the core of this case. What happened at trial is irrelevant if the case should have been decertified before trial. Under the FLSA, the exempt status of a retail manager "*must* be based on all the facts in a *particular case*" and determined "on a *case-by-case* basis." 29 C.F.R. §§ 541.700(a), 541.106(a) (2006) (emphasis added). Family Dollar had the legal right to examine each plaintiff individually to determine his or her exempt status. Allowing 1,424 exemption claims to proceed in one collective action abridged Family Dollar's substantive right to defend itself against each claim individually.

This is where due process comes in. The conflict in this case is between the FLSA's executive exemption, which requires that each plaintiff's claim be decided separately, and its procedural collective action device, which allows "similarly situated" plaintiffs to be treated the same. Superficial similarity cannot justify a collective action where there are irreconcilable differences on the only issue to be adjudicated. If the certification procedure under § 216(b) means anything, the plaintiffs must be so "similarly situated" that their testimony is interchangeable on the facts that lead to liability. A class or collective action leads to judicial efficiency only where liability to the many can be fairly imposed based on representative testimony from the few. This is only possible where the facts dispositive of each plaintiff's legal claim are so similar that it doesn't matter which plaintiff testifies.

Not so here. And no trial procedure or jury instruction could change the plaintiffs' heterogeneity. Even though the District Court ordered plaintiffs' counsel to select the "representatives" who would testify (Doc. 384 ¶ 9(b)) and instructed the jury that their testimony was "representative of other employees who perform substantially similar work" (Doc. 719 at 9), those instructions hid the true facts revealed at decertification. And by charging the jury to render an all-or-nothing verdict for 1,424 plaintiffs based on the testimony of the 7 "representative plaintiffs who did testify" (*id.* at 10), the instruction ensured that the outcome would be unfair regardless of who won. *See* Pet. 30–32. Refusing to decertify the collective action thus sacrificed the individual adjudication necessitated by the true facts and required by the FLSA. Instead, the testimony of very few determined the fate of all plaintiffs, regardless of how different they really are.

Due process does not permit such rough justice. Liability for so many cannot be imposed based on the testimony of so few where all of their testimony is so inconsistent. *See Hansberry v. Lee*, 311 U.S. 32, 44–45 (1940).

To avoid these problems, the Court should read § 216(b) in a way that is consistent with its Rule 23(b)(3) jurisprudence. Such a reading would assure that the plaintiffs share common questions of fact or law, that individual issues of liability do not predominate, that a collective action is superior to case-by-case litigation, and that a collective trial can be managed fairly and efficiently without devolving into a series of mini-trials.

Under that approach, Family Dollar would not have been forced to try 1,424 different claims in one collective trial before one jury. Instead, the case would have been decertified so that Family Dollar could defend itself against each exemption claim individually.

The Court should grant certiorari, vacate the judgment, and decertify the collective action so the plaintiffs' claims may be litigated individually as the FLSA requires.

Respectfully submitted,

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Supreme Court, U.S.
FILED
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(8)

No. 08-1287

IN THE
Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY APPENDIX

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Table C-3 – Private Civil Cases – Labor Suits Only - Commenced during the 12-month period ending 09/20/2008		
District	2008 Filings	Percentage
DC	133	0.810%
1st	376	2.290%
2nd	1,976	12.034%
3rd	1,394	8.490%
4th	892	5.432%
5th	943	5.743%
6th	1,498	9.123%
7th	2,067	12.588%
8th	941	5.731%
9th	2,271	13.831%
10th	350	2.132%
11th	3,579	21.797%
Total Filings	16,420	100.000%

Table C-3A - Private Civil Cases - Labor Suits Only - PENDING during the 12-month period ending 09/20/2008		
District	2008 Filings	Percentage
DC	129	0.866%
1st	412	2.766%
2nd	2,010	13.494%
3rd	943	6.331%
4th	617	4.142%
5th	876	5.881%
6th	1,267	8.506%
7th	1,494	10.030%
8th	757	5.082%
9th	2,135	14.333%
10th	333	2.235%
11th	3,923	26.336%
Total Filings	14,896	100.000%

Table C-3 - Private Civil Cases - Labor Suits Only - Commenced during the 12-month period ending 09/20/2007		
District	2007 Filings	Percentage
DC	116	0.636%
1st	392	2.150%
2nd	1,781	9.768%
3rd	1,273	6.982%
4th	973	5.336%
5th	983	5.391%
6th	1,428	7.832%
7th	2,186	11.989%
8th	897	4.920%
9th	2,294	12.582%
10th	340	1.865%
11th	5,570	30.549%
Total Filings	18,233	100.000%

Table C-3A- Private Civil Cases - Labor Suits Only - PENDING during the 12-month period ending 09/20/2007		
District	2007 Filings	Percentage
DC	108	0.751%
1st	427	2.971%
2nd	1,902	13.234%
3rd	899	6.255%
4th	643	4.474%
5th	899	6.255%
6th	1,315	9.150%
7th	1,428	9.936%
8th	737	5.128%
9th	1,957	13.617%
10th	326	2.268%
11th	3,731	25.960%
Total Filings	14,372	100.000%

Table C-3.
U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2008

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions						Forfeitures and Penalties	Labor Suits	Social Security	All Other
							Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other				
	TOTAL	287,257	44,164	3,420	1,619	1,900	2,132	6,352	3,030	6	838	366	698	2,331	368	13,136	7,967
DC		2,438	1,354	59	1	33	283	42	101	-	202	8	15	29	11	23	487
	1ST	6,504	1,450	64	108	80	63	186	66	-	87	2	11	87	21	353	394
ME		427	112	2	1	7	1	20	-	-	-	-	-	4	2	69	6
MA		2,901	704	30	9	36	19	64	56		10	-	10	23	5	119	321
NH		501	130	14		3	4	15	2	-	1	2	-	21	3	46	19
RI		1,259	116	7	-	3	2	20	3	-	1	-	-	7	4	50	19
PR		1,416	368	11	98	31	37	66	2	-	5	-	1	32	7	69	29
	2ND	22,815	3,126	161	66	194	148	395	135	-	35	24	74	226	58	854	756
CT		1,957	346	38	2	19	22	32	23	-	1	-	7	20	14	53	110
NY N		1,395	297	6	2	20	14	30	4	-	-	-	-	35	4	167	15
NY E		6,460	1,033	72	12	78	45	94	42	-	15	1	19	37	24	227	367
NY S		12,125	969	23	4	55	51	183	50	-	13	8	48	47	12	233	232
NY W		1,589	390	20	29	20	14	40	14	-	6	15	-	74	2	135	21
VT		281	91	2	17	2	2	6	2	-	-	-	-	13	2	39	6
	3RD	52,327	3,147	125	133	159	154	301	492	-	131	11	80	133	25	872	531
DE		984	86	2	1	8	7	5	-	-	-	-	2	10	-	38	13
NJ		6,662	903	18	2	57	51	75	106	-	29	1	38	35	11	180	236
PA E		18,296	861	29	14	44	48	123	85	-	-	-	30	10	9	290	178
PA M		2,454	858	19	44	20	19	49	212	-	93	3	8	22	2	107	60
PA W		2,596	597	53	64	19	23	45	27	-	8	4	2	52	2	257	41
VI		345	42	4	8	11	6	1	2			3	-	5	1	-	1
	4TH	18,167	4,051	159	98	191	174	818	308	-	95	25	139	237	19	1,238	454
MD		3,463	899	36	9	68	71	105	7	-	5	-	50	86	3	280	179
NC E		1,432	552	36	1	18	11	73	73	-	20	3	74	33	-	188	22
NC M		978	268	16	-	6	12	109	4	-	3	-	1	37	-	65	15
NC W		1,191	261	20	2	5	9	124	2			-	-	12	1	74	12
SC		4,454	593	24	81	24	8	145	33	-	11	12	3	23	2	191	96
VA E		3,173	593	6	1	41	48	162	51	-	11	10	7	29	5	68	154
VA W		1,177	418	5	1	12	6	112	64	-	21		-	6		170	21
WV N		709	191	7	1	3	3	40	53	-	10	-	4	2	2	58	6
WV S		1,590	276	9	2	14	6	48	21		14	-	-	9	2	144	7

RA2

Table C-3. (September 30, 2008—Continued)

Circuit and District	Private Cases															
	Total Private Civil Cases	Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Conditions and Civil Rights	Prisoner Petitions: Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
TOTAL	223,093	30,752	3,453	453	1,403	3,619	60,953	3,683	30,000	18,268	187	24,375	667	9,573	16,420	19,297
DC	1,084	117	35	-	-	17	166	21	279	16	-	56	2	60	133	182
1ST	5,054	816	229	14	45	63	1,169	146	801	250	-	306	16	297	376	528
ME	315	70	4	1	6	4	28	15	76	14	-	22	-	28	15	30
MA	2,197	405	24	13	29	23	229	102	344	181	-	147	14	190	224	298
NH	371	60	8	-	1	8	36	3	60	46	-	44	1	33	22	42
RI	1,143	84	138	-	4	13	697	17	72	18	-	21	-	17	29	32
PR	1,029	196	55	-	5	15	183	4	246	11	-	72	-	23	86	126
2ND	19,689	3,728	123	98	124	409	3,456	325	3,579	929	-	1,461	43	1,070	1,976	2,368
CT	1,611	259	22	22	4	27	145	43	434	46	-	139	-	90	111	279
NY,N	1,099	100	10	15	-	27	60	21	232	162	-	258	-	60	70	83
NY,E	4,420	470	33	16	81	180	424	73	1,154	240	-	197	6	189	771	812
NY,S	11,155	2,754	46	45	38	143	2,709	171	1,480	328	-	624	35	694	946	1,140
NY,W	1,205	98	11		1	23	91	13	233	142	-	241	2	49	67	238
VT	199	47	1	-	-	9	27	4	46	11	-	12	-	8	9	16
3RD	40,180	2,457	345	73	71	542	34,317	339	3,234	1,000	17	1,995	25	848	1,384	2,345
DE	808	93	2		3	22	18	7	110	75	1	176	1	214	24	152
NJ	5,749	942	77	5	41	183	754	140	902	176	-	652	9	361	722	765
PA,E	18,435	684	38	60	10	213	32,274	144	1,319	411	12	513	4	279	350	824
PA,M	1,798	236	136	5	-	66	84	22	370	180	1	395	5	33	75	232
PA,W	1,999	251	31	3	6	26	112	20	478	230	3	316	1	97	218	247
VI	303	-	61	-	11	12	76	6	29	8	-	13	5	2	6	25
4TH	14,116	1,880	172	10	50	349	2,697	266	1,774	1,301	11	3,068	158	548	892	922
MD	2,564	407	45	1	10	35	276	66	388	98	-	491	117	97	290	243
NC,E	880	124	15	-	10	13	80	20	134	67	4	147	2	128	50	72
NC,M	710	94	13		1	2	125	8	138	108	2	111	3	47	28	40
NC,W	930	158	8	-	1	10	347	15	122	41	1	67	-	59	39	62
SC	3,861	421	19	-	17	105	703	55	393	446	1	1,270	16	50	254	111
VA,E	2,580	415	20	1	7	55	328	59	355	319	2	415	14	139	173	278
VA,W	759	57	8	1	-	22	58	16	64	66	1	305	2	17	44	46
WV,N	578	79	21	-	-	25	56	2	67	81	-	182	3	7	23	32
WV,S	1,254	153	23	7	4	22	714	25	78	53	-	80	1	4	51	58

RA3

Table C-3. (September 30, 2008—Continued)

Circuit and District	Total Civil Cases	U.S. Cases															
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Prison Civil Rights	Prisoner Petitions: Prison Condition	Prisoner Petitions: Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
5TH	31,707	5,161	880	333	233	214	921	495	-	126	10	32	217	21	936	743
LA,E	8,325	300	44	11	70	28	31	2	-	3	1	2	3	1	52	52
LA,M	917	103	3	2	2	2	19	-	-	1	-	-	2	-	23	49
LA,W	2,102	448	36	10	26	11	54	79	-	18	4	1	1	1	162	44
MS,N	981	122	7	1	8	3	20	1	-	-	-	-	9	-	67	6
MS,S	2,996	228	32	8	24	13	39	32	-	11	1	-	17	2	31	18
TX,N	4,055	871	24	8	20	47	150	131	-	26	2	10	10	5	169	269
TX,E	2,866	480	3	2	6	11	92	130	-	45	1	4	24	1	124	89
TX,S	6,330	1,734	644	279	36	44	276	67	-	19	1	10	64	6	140	149
TX,W	3,185	875	87	12	41	52	240	53	-	3	-	5	87	5	182	128
6TH	20,778	4,536	623	260	131	182	499	113	1	60	79	39	233	53	1,771	472
KY,E	1,720	878	8	120	33	12	46	70		49	70	3	14	2	436	15
KY,W	1,338	306	20	74	3	4	28	3	1	12	5	2	29	1	105	18
MI,E	5,442	1,088	438	7	29	55	55	8	-	3	-	20	67	6	231	158
MI,W	1,681	240	22	6	6	9	46	9		2	-	2	9	1	100	23
OH,N	4,068	619	70	13	15	32	90	7		4		7	29	19	255	72
OH,S	2,666	585	48	14	16	26	60	4	-	4	-	5	35	14	311	56
TN,E	1,225	286	12	13	6	4	75	3	-	1	-	-	-	6	160	16
TN,M	1,525	282	2	14	7	18	40	-	-	-	-	-	23	2	86	90
TN,W	1,217	241	2	2	14	10	58	9	-	5	4	-	27	2	84	24
7TH	15,783	2,201	118	125	103	144	378	92	-	38	16	7	119	35	561	465
IL,N	7,681	822	15	10	55	78	111	16	-	15	8	5	26	22	128	333
IL,C	1,047	220	13	24	2	9	50	6	-	-	4	-	11	3	79	19
IL,S	929	174	16	12	13	5	36	42	-	4	2	-	13	1	19	12
IN,N	1,471	233	21	19	6	16	44	-	-	1			19	3	84	10
IN,S	2,704	382	31	50	15	22	66	10	-	3	1	-	15	3	136	30
WI,E	1,164	191	12	4	8	11	34	3	-	1	1	1	18	3	65	30
WI,W	787	179	11	6	4	3	37	15	-	14	-	1	17	-	40	31
8TH	18,708	3,044	181	107	78	116	473	181	-	24	26	15	125	26	1,385	298
AR,E	4,723	390	14	13	6	14	33	58	-	2	21	-	2	-	210	17
AR,W	865	331	14	4	2	2	12	-	-	-	-	-	8	-	277	12
IA,N	551	266	14	20	-	1	67	5	-	-	-	-	12	1	139	7
IA,S	765	247	3	24	6	8	48	9	-	1	1	7	11	-	118	11
MN	6,186	336	45	10	12	14	32	37	-	10	-	-	17	6	54	99
MO,E	2,250	461	30	4	15	31	89	8	-	5	1	4	41	6	201	26
MO,W	2,013	625	38	2	18	26	81	52	-	2	3	1	13	11	297	61
NE	751	205	20	14	6	6	61	5	-	1	-	3	16	1	40	30
NC	267	79	11	15	2	4	22	4	-	-	-		5	1	11	4
SD	342	101	1	-	9	7	28	3	-	3	-	-	-	-	38	11

RA4

Table C-3. (September 30, 2008—Continued)

Circuit and District	Total Private Civil Cases	Private Cases: Contract	Real Property	FELA[1]	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions: Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
5TH	26,546	8,488	480	45	572	763	3,611	443	2,598	2,791	33	2,852	52	1,048	943	1,835
LA E	8,025	5,041	22	9	354	188	1,207	84	257	202	1	198	2	34	85	349
LA M	814	178	14	1	17	61	111	13	101	56	-	186	2	8	27	39
LA W	1,654	315	71	7	101	98	291	29	186	116	-	309	1	16	66	48
MS N	858	119	12	-	1	35	130	78	205	90	1	118	1	11	33	22
MS S	2,768	897	165	1	13	117	678	25	216	102	2	342	7	7	75	61
TX N	3,184	488	56	5	2	55	151	55	510	658	11	562	13	195	157	259
TX E	2,388	387	27	11	10	88	175	27	180	442	7	381	7	358	80	182
TX S	4,566	777	81	8	73	70	711	92	513	659	6	458	8	192	273	637
TX W	2,290	286	32	3	1	51	153	40	420	433	5	297	11	218	137	203
6TH	10,242	2,178	603	48	71	318	2,178	308	3,114	1,959	16	1,668	42	641	1,498	1,804
KY E	642	188	14	1	1	36	141	25	140	43	2	81	2	29	60	79
KY W	1,030	179	11	2	22	43	126	22	192	92	-	153	4	20	103	61
MI E	4,364	647	98	20	35	55	191	99	733	842	1	365	8	206	461	502
MI W	1,341	122	18	2	3	11	33	17	175	260	-	386	2	38	96	167
OH N	3,498	413	287	10	3	48	1,032	46	473	318	3	137	22	129	287	269
OH S	2,071	269	163	8	5	18	110	33	560	238	4	104	-	95	246	211
TN E	827	113	17	3	1	45	154	21	207	37	2	117		32	73	105
TN M	1,243	121	5	-	-	23	277	28	316	74	2	170	2	34	109	62
TN W	976	124	9	2	1	39	105	17	318	54	2	145	2	37	63	58
7TH	13,862	1,648	124	66	27	191	753	300	2,981	1,196	7	1,788	16	667	2,067	1,861
IL N	6,858	874	61	10	18	76	302	202	1,526	178		529	9	335	1,427	1,269
IL C	827	75	12	7	-	9	46	7	177	59	-	268	1	17	86	63
IL S	755	70	4	19	7	23	111	21	109	40	-	184	1	21	53	92
IN N	1,238	145	11	6	2	34	78	19	300	215	3	205	-	30	98	94
IN S	2,322	204	28	10	-	42	170	23	563	511	4	303	-	92	216	175
WI E	963	116	4	3	-	3	30	21	198	126	-	149	3	56	113	121
WI W	618	64	4	-	-	2	16	7	118	67	-	151	2	66	76	45
8TH	16,664	1,306	103	28	9	184	8,018	379	1,513	758	4	1,385	12	387	941	637
AR E	4,333	124	13	6	2	34	3,290	24	240	103	3	396	-	16	43	37
AR W	529	106	7	3	-	16	58	17	78	21	-	147	-	10	29	37
IA N	285	45	6	-	-	3	24	4	66	35	-	55	1	7	19	20
IA S	518	71	3	4	-	9	38	7	104	53	-	112	3	27	54	33
MN	3,650	311	23	3	1	15	4,094	141	312	134	-	86	-	145	390	195
MO E	1,798	285	13	-	6	41	207	120	285	164	1	205	5	110	220	127
MO W	1,385	205	21	1	-	40	174	44	230	168	-	244	1	28	124	104
NE	540	97	8	4	-	11	43	7	146	33	-	65	2	28	40	50
ND	188	21	8	5	-	6	66	10	18	8	-	19	-	8	11	16
SD	241	42	1	-	-	9	35	5	34	39	-	56	-	7	5	10

[1] FELA = Federal Employers' Liability Act

RA5

Table C-3. (September 30, 2008—Continued)

Circuit and District	Total Civil Cases	U.S. Cases															
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Habeas Corpus General	Habeas Corpus Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
9TH	39,909	8,610	583	147	431	367	983	918	1	89	6	127	475	61	2,596	2,225
AK	361	112	8	3	28	5	17	-	-	1	-	1	17	1	19	12
AZ	3,539	976	39	28	60	32	347	123	-	3	4	9	23	6	125	176
CA N	6,175	892	65	6	54	61	36	16	-	15	2	5	36	10	97	486
CA E	4,607	705	11	8	26	20	68	70	-	42	-	12	54	4	277	114
CA C	14,130	2,854	324	11	39	92	121	165	1	13	-	19	155	20	1,023	809
CA S	2,650	525	28	33	47	41	138	15	-	2		50	64	2	48	150
HI	578	113	13	6	14	14	43	1	-	-	-	-	4	2	6	30
ID	576	128	10	7	5	6	19	-		-	-	-	3	1	49	25
MT	610	174	15	17	15	7	52	1			-	-	3	-	34	30
NV	2,568	781	10	8	21	22	45	5	-	5	-	23	47	2	17	76
OR	2,204	685	31	9	18	17	36	4	-	3	-	7	27	6	445	86
WA E	650	272	5	5	12	8	29	3	-	1	-	-	9	-	170	27
WA W	2,938	772	23	3	32	36	44	114	-	2	-	1	31	4	288	194
GUAM	22	9	-	-	3	-	4	-	-	1	-	-	-			
NMI	58	12		-	-	4	4	-	-	-	-	-	2	-		2
10TH	9,918	2,388	107	93	109	120	372	158	-	26	111	11	120	23	783	365
CO	2,877	649	7	5	20	40	43	110		9	101	1	21	8	137	147
KS	1,517	408	14	17	9	17	62	41		16	9	6	32	6	149	29
NM	1,267	277	17	5	38	20	70	1	-	-	1	-	33	2	64	25
OK N	751	214	17	20	11	2	34					-	4	-	110	6
OK E	498	192	6	16	10	4	25	-	-	1	-	-	5	-	116	9
OK W	1,450	315	34	22	13	15	49	-		-	-	1	5	4	128	44
UT	1,190	275	7	6	9	19	59	-	-	-	-	1	16	2	74	79
WY	326	68	5	2	1	3	30	-	-	-	-	-	4	1	5	7
11TH	28,205	5,088	350	148	158	188	885	293	3	75	48	48	330	19	1,766	777
AL N	2,461	468	23	11	7	15	51	29		3	-	1	27	1	273	27
AL M	1,102	225	10	2	8	10	27	2		1	-	3	8	1	148	5
AL S	762	187	11	-	6	5	40	-	-	-	-		9	-	94	22
FL N	1,732	451	35	3	14	24	65	30	-	-	10	2	70	1	149	48
FL M	7,593	1,536	65	107	61	37	220	125	3	50	24	10	39	4	593	207
FL S	7,815	1,170	132	10	36	39	283	64		7	14	15	65	6	206	293
GA N	4,621	821	52	11	12	41	101	39		14	-	16	75	4	138	120
GA M	1,132	250	16	-	3	9	44	-		-	-	-	34	-	108	36
GA S	967	176	6	2	11	8	54	4	-	-	-	1	10	2	59	19

RAS

Table C-3. (September 30, 2008—Continued)

Circuit and District	Private Cases																
	Total Private Civil Cases	Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Conditions and Civil Rights	Prisoner Petitions: Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
9TH	31,299	3,782	616	43	156	204	1,685	608	4,635	5,273	39	5,328	185	2,740	2,271	3,526
AK	249	66	8	-	7	5	30	2	49	34	-	7	2	4	17	18
AZ	2,563	317	143	-	*	33	108	89	460	389	3	980	2	165	94	310
CA N	5,243	492	69	1	18	12	422	87	649	785	3	1,001	14	478	551	723
CA E	3,102	231	23	7	5	21	105	52	742	1,180	3	1,274	17	76	133	232
CA C	9,270	1,164	164	5	7	35	362	254	1,200	1,601	5	842	7	1,394	819	1,187
CA S	2,025	248	42	-	12	3	82	36	289	398	2	367	5	194	112	255
HI	465	97	10	-	24	6	40	14	128	23	-	50	2	16	26	27
ID	448	67	8	-	-	5	17	8	60	57	-	140	-	22	26	38
MT	436	95	15	1	-	12	50	16	65	45	-	84	4	3	15	31
NV	2,307	415	58	2	1	38	164	45	380	240	22	437	32	137	110	226
OR	1,553	214	9	5	7	20	87	33	359	214	-	183	108	72	119	142
WA E	376	34	5	10	-	2	28	7	97	34	-	97	-	16	16	32
WA W	2,156	333	50	11	75	11	83	35	347	150	1	275	2	161	228	324
GUAM	14	3	1	-	-	-	3	-	2	2	-	-	-	2	1	-
NMI	34	6	-	-	1	1	4	-	18	1	-	-	-	-	2	1
10TH	7,618	1,283	107	32	6	240	738	127	1,756	649	14	951	14	397	350	854
CO	2,226	578	25	10	4	44	149	30	364	202	2	351	-	137	88	444
KS	1,105	162	10	5	-	60	123	33	238	93	-	172	3	40	87	83
NM	980	142	15	2	-	47	85	14	398	61	-	102	1	23	37	62
OK N	577	124	7	1	-	11	65	7	168	51	2	34	3	21	48	35
OK E	306	36	11	4	-	14	31	4	90	35	-	57	1	1	7	15
OK W	1,126	201	15	3	1	24	152	9	288	136	8	110	5	30	37	113
UT	915	202	18	3	1	17	97	26	144	39	1	91	1	142	40	93
WY	258	38	5	4	-	23	36	4	66	30	-	34	-	3	6	9
11TH	23,119	3,165	618	7	272	339	2,167	421	3,536	2,065	48	3,518	93	780	3,579	2,625
AL N	1,993	307	25	-	-	50	153	27	488	161	5	323		41	182	221
AL M	877	99	3	-	-	38	70	22	196	116	3	239	5	7	36	39
AL S	605	170	33	-	13	17	52	20	113	41	1	71	-	7	18	49
FL N	1,281	117	10	-	6	18	68	6	323	244	5	352	7	25	60	40
FL M	6,055	736	78	1	27	70	703	76	856	641	18	603	12	220	1,419	535
FL S	6,645	1,096	171	3	214	29	611	108	681	329	11	414	31	265	1,609	1,063
GA N	4,000	460	180	-	2	61	409	141	627	262	-	810	31	179	185	553
GA M	882	80	10	-	-	30	62	13	152	110	2	317	3	24	42	37
GA S	781	90	8	3	10	20	39	8	86	161	1	289	4	12	16	28

*FELA = FEDERAL EMPLOYERS' LIABILITY ACT

RA7

Table C-3A.
U.S. District Courts—Civil Cases Pending, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2008

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions						Forfeitures and Penalties	Labor Suits	Social Security	All Other
							Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other				
TOTAL	298,129	37,669	1,686	1,698	2,190	2,574	5,630	1,839	34	654	256	280	2,223	284	12,516	5,805
DC	2,837	1,512	76	1	37	383	77	169	-	120	2	8	61	14	31	533
1ST	7,038	1,251	38	35	102	99	226	25	-	32	2	8	103	10	293	278
ME	296	78			6	4	17	-	-	-	-	-	3	1	50	3
MA	2,992	602	15	9	53	33	78	24		23	-	7	28	5	95	328
NH	454	97	5	-	2	5	5		-	-	2	-	25	1	32	16
RI	1,627	118	8	-	3	2	19	1	-	1	-	-	7	-	59	18
PR	1,666	356	6	28	38	55	112	-	-	6	-	1	40	3	57	10
2ND	37,180	3,273	123	67	273	195	474	108	-	33	23	43	204	33	1,086	611
CT	2,234	255	18	2	22	24	27	19	-	4		2	12	5	54	66
NYN	2,119	268	3	2	28	16	32	2	-				26	3	335	22
NYE	7,162	1,066	65	18	116	74	158	34	-	15	2	15	41	12	254	261
NYS	22,798	976	14	4	76	53	205	36	-	6	10	25	46	10	255	237
NYW	2,603	437	23	27	27	26	45	17	-	6	11	-	66	3	150	34
VT	266	71	-	14	2	2	7	-	-	-	-	-	13		28	5
3RD	69,334	2,429	70	84	176	170	272	252	1	109	19	17	93	25	701	440
DE	1,264	111	1	1	11	9	13	-	-	-	-	-	13	1	46	16
NJ	6,216	645	14	4	62	54	66	61		17	1	5	22	12	158	165
PAE	16,426	982	12	9	36	36	104	32	-	3	-	3	7	5	219	116
PAM	2,108	439	12	10	20	24	39	114	1	85	4	3	21	-	81	27
PAW	2,084	423	20	27	17	20	37	25	-	3	9	1	22	2	196	44
VI	1,186	229	11	33	30	27	13	20	-	3	5	2	8	5	1	1
4TH	13,872	3,385	89	48	177	182	773	168	-	67	24	107	192	13	1,278	267
MD	3,001	746	31	7	59	81	95	2	-	2		30	55	2	239	112
NCE	1,438	568	27	2	19	26	86	53	-	16	12	92	32	-	170	21
NCM	828	270	6	-	12	12	59	3	-	2	-	-	42	2	113	17
NCA	887	207	5		3	11	93	-	-	-	-		15	1	55	14
SC	3,357	484	10	31	26	9	143	12	-	1	4	1	17	1	200	29
VAE	1,571	276	2	-	24	27	84	23	-	5	7	3	17	3	46	35
VAW	644	270	1	3	14	4	58	8	-	11	-	-	7	-	135	19
WVN	614	199	4	3	9	3	56	38	-	14	1	1	1	3	58	9
WVS	1,532	357	3	2	11	9	79	29	-	13	-	-	6	1	192	12

Table C-3A. (September 30, 2008—Continued)

Circuit and District	Total Private Civil Cases	Private Cases													
		Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Conditions and Civil Rights	Prisoner Petitions: Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
TOTAL	268,460	27,466	2,745	509	1,670	3,795	107,969	4,477	32,408	17,924	738	18,066	389	8,832	14,896	18,466
DC	1,325	153	37	-	-	27	185	26	358	12	-	48	1	70	129	278
1ST	6,787	656	238	27	74	74	1,589	152	1,831	235	-	305	13	271	412	583
ME	221	47	2	-	4	4	22	8	54	11	-	15		21	12	35
MA	2,390	440	31	26	47	28	275	106	422	152	-	160	8	170	246	278
NH	357	51	7	-	2	8	39	11	59	39	-	57	-	22	15	37
RI	1,509	104	160	-	7	13	1,004	19	78	18	-	17	-	19	28	41
PR	1,310	214	38	-	14	21	249	8	497	15	-	56	1	59	111	135
2ND	33,967	3,825	179	141	178	483	12,707	582	5,293	1,583	-	2,101	19	1,255	2,010	3,552
CT	1,979	285	26	23	5	38	144	57	641	55	-	176	-	61	108	192
NY,N	1,460	128	20	28	8	40	92	27	383	228		483	-	57	93	85
NY,E	6,086	608	59	25	113	168	706	121	1,702	444	-	223	5	242	762	907
NY,S	21,821	2,628	58	66	55	170	11,614	346	2,017	498	-	654	12	780	878	2,485
NY,W	2,166	133	15	1	1	40	120	27	456	353	-	539	1	77	158	244
VT	185	42	1	-	-	6	30	4	43	7	-	26	-	9	10	14
3RD	66,906	2,337	432	89	88	666	53,164	368	3,386	806	62	1,461	17	992	943	2,212
DE	1,153	110	2	-	8	24	20	10	139	64	5	162	1	325	31	248
NJ	5,571	968	200	12	44	191	898	148	1,066	98	1	527	3	193	434	584
PA,E	55,894	713	27	65	9	199	51,858	130	1,062	288	23	231	4	163	289	858
PA,M	1,860	271	93	8		94	169	29	459	165	10	280	1	27	65	168
PA,W	1,661	215	26	4	8	20	88	25	503	186	13	231	1	58	125	147
VI	967	116	114	-	19	38	217	18	137	27	-	30	7	4	15	209
4TH	10,487	1,589	145	12	58	284	2,158	224	1,576	760	38	1,348	45	418	617	1,183
MD	2,255	338	33	3	8	84	164	53	366	64	2	208	31	71	161	627
NC,E	870	116	16	-	15	13	97	13	159	62	14	145	1	94	53	72
NC,M	550	98	12		1	2	62	8	129	35	7	63	1	53	24	57
NC,W	680	145	5	-	-	11	201	14	113	14	2	23	-	55	42	55
SC	2,873	380	17	-	20	84	797	41	411	314	1	507	5	38	160	100
VA,E	1,205	232	9	1	9	29	152	35	200	117	2	161	3	85	86	174
VA,W	374	50	22	1		12	47	13	77	32	2	54	-	12	24	28
WV,N	415	86	14	-	-	28	45	6	36	60	-	79	3	9	24	23
WV,S	1,175	154	17	7	5	21	563	31	85	82	-	107	1	3	43	56

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Table C-3A. (September 30, 2008—Continued)

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Prison Civil Rights	Prisoner Petitions: Prison Condition	Prisoner Petitions: Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
5TH	34,761	4,530	346	599	323	249	697	320	3	103	6	12	204	25	995	536
LA E	15,394	578	101	200	126	27	20	3	-	1	1		2	1	50	46
LA M	854	71	2	3	8	5	13	-	-	-	-	-	-	-	27	15
LA W	2,149	424	25	27	49	15	45	30	-	10	4	-	3	1	161	43
MS N	1,077	138	4	2	6	6	31	-		-	-	-	13	-	69	8
MS S	3,039	301	16	5	39	22	50	63	-	11	1	-	25	2	35	32
TX N	3,037	615	7	6	17	49	112	66	1	20		3	10	4	169	158
TX E	2,592	527	2	2	7	14	116	102	2	49	1	2	21	1	169	30
TX S	4,213	1,151	153	252	58	64	267	30		12	1	3	54	11	48	112
TX W	2,406	723	36	12	42	47	243	20	-	-	-	4	76	5	159	85
6TH	21,348	3,712	192	192	158	197	531	49	6	39	38	0	220	32	1,651	328
KY E	1,471	613	3	83	51	11	45	19	1	16	10	1	16	1	310	26
KY W	1,297	236	7	25	10	11	22	1	1	11	4	2	30	-	70	36
MI E	5,795	706	122	8	32	40	73	11	-	2	-	4	72	5	226	138
MI W	1,448	193	6	7	5	10	32	3	-	1		1	6	2	98	22
OH N	4,605	442	15	5	12	34	57	-	-	4	-	-	17	5	259	32
OH S	2,741	583	29	10	17	33	63	5	4	2		1	29	8	309	73
TN E	1,410	344	5	13	5	7	129	-	-	1	-	-	2	6	152	23
TN M	1,064	307	-	89	9	18	29	-					15	3	141	59
TN W	1,413	289	4	2	17	31	81	10	-	2	4		29	2	69	19
7TH	14,653	1,769	100	78	106	162	262	58	-	18	14	0	93	38	938	304
IL N	7,386	797	51	3	56	98	93	6	-	8	8	0	25	20	135	144
IL C	1,047	170	5	5	2	10	26	2	-	-	-		10	8	65	14
IL S	998	186	6	8	21	10	44	35	-	6	4	-	16	2	17	16
IN N	1,475	189	12	13	5	13	24	-	-	-	-	-	13	3	97	9
IN S	2,346	324	10	40	15	22	50	3	-	1	-	-	11	3	133	30
WI E	1,091	137	7	3	6	8	21	2	-	-	1	-	11	2	48	24
WI W	398	62	9	4	3	1	4	2	-	3	-	-	8	-	10	12
8TH	18,755	2,491	88	77	85	114	390	98	3	13	20	2	124	13	1,223	221
AR E	7,681	319	7	8	11	10	13	32	-	-	17	-	2	-	204	15
AR W	614	307	5	4	4	3	9	-	1	-	-	-	6	-	256	20
IA N	468	223	8	13	-	3	103	1		1	-	-	13	-	70	4
IA S	789	221	4	18	9	7	41	2		-	-	-	16	2	102	2
MN	5,099	294	22	10	13	19	18	24		8	-	-	14	4	49	25
MO E	2,659	431	14	4	18	25	117	1	1	2	-	2	29	2	201	30
MO W	1,476	446	17	-	12	27	31	33	1	1	2	-	17	4	267	36
NE	611	138	3	9	9	5	22	3		1		-	10	-	34	27
ND	184	41	6	10	3	3	6	-					4	1	2	1
SD	394	131	2	1	16	13	23	2	-	-	-	-	5	-	36	13

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Table C-3A. (September 30, 2008—Continued)

Circuit and District	Private Cases														
										Prisoner Petitions					
	Total Private Civil Cases	Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
9TH	**30,231**	**6,304**	**319**	**59**	**732**	**611**	**11,635**	**[illegible]**	**2,803**	**2,096**	**186**	**1,981**	**23**	**1,036**	**876**	**1,214**
LA,E	14,816	3,113	83	11	425	188	5,801	153	304	186	-	186	-	27	79	347
LA,M	780	147	9	1	19	67	131	17	152	37	1	114	2	14	30	48
LA,W	1,725	354	42	8	144	106	299	41	249	99	1	231	1	17	83	48
MS,N	941	148	15	1	3	125	116	84	236	72	12	86		6	24	18
MS,S	2,738	1,015	38	1	13	121	639	28	268	152	14	321	5	12	55	60
TX,N	2,418	394	35	1	1	46	96	41	436	522	24	345	6	164	142	77
TX,E	2,065	273	14	20	14	92	146	25	197	324	18	242	3	515	78	103
TX,S	3,086	636	50	12	113	51	299	57	468	332	24	270	2	120	253	309
TX,W	1,683	242	24	1		41	121	30	369	271	12	175	4	121	134	146
8TH	**17,836**	**2,218**	**287**	**72**	**84**	**377**	**3,821**	**376**	**3,361**	**2,253**	**84**	**1,340**	**17**	**573**	**1,267**	**1,393**
KY,E	858	179	14	1	2	51	177	42	163	98	5	76	2	48	45	71
KY,W	1,061	252	14	2	23	52	151	23	190	67	4	136	3	26	65	73
MI,E	4,590	616	64	23	37	61	268	128	844	1,128	-	285	3	189	399	552
MI,W	1,255	114	9	4	2	11	33	16	148	368	-	362		33	56	67
OH,N	4,167	361	36	17	3	46	2,432	48	385	242	17	76	7	110	203	176
OH,S	2,156	311	27	12	7	20	98	47	651	241	47	94	-	64	237	229
TN,E	1,056	154	19	6	1	66	170	21	263	41	6	101	-	33	71	54
TN,M	1,357	103	44	1	4	21	484	29	320	90	5	75		52	93	131
TN,W	1,124	199	10	4	5	49	107	25	357	74	10	156	2	35	70	70
7TH	**12,884**	**1,578**	**178**	**58**	**31**	**213**	**823**	**518**	**3,316**	**718**	**8**	**1,572**	**8**	**605**	**1,494**	**1,754**
IL,N	6,697	847	72	18	16	72	383	406	1,736	179	2	461	3	352	825	1,225
IL,C	877	78	13	7	4	14	35	9	249	44	-	186	2	29	4	35
IL,S	812	86	6	19	8	23	84	13	122	38	-	263	2	21	58	68
IN,N	1,266	140	15	9	2	54	31	29	418	118	3	120		33	133	53
IN,S	2,022	292	65	7	1	48	175	35	541	214	3	221	-	72	198	242
WI,E	694	121	4	8	-	1	26	21	204	106	-	156	-	65	21	131
WI,W	296	34	3	-	-	1	9	6	58	19		66	1	42	30	20
6TH	**17,264**	**1,223**	**81**	**40**	**83**	**211**	**10,615**	**474**	**1,508**	**643**	**19**	**884**	**9**	**335**	**797**	**472**
KY,E	2,662	122	10	15	5	39	1,676	27	238	92	10	230	3	10	19	38
KY,W	527	9	5	3		20	56	19	75	7	2	157	-	9	18	31
MI,N	245	47	4	1	-	3	26	6	78	16		47	-	5	41	14
MI,S	548	7	2	4	-	15	58	15	141	12	-	84	-	23	57	26
OH,N	4,045	280	21	9	2	21	3,397	117	327	72	-	67	-	163	278	147
OH,S	1,628	247	6	1	6	38	271	222	230	243	4	66	1	50	151	78
TN,E	1,030	207	15	2	-	45	96	48	212	52	-	136	2	19	89	54
TN,M	473	83	7	6	-	15	42	7	133	31	-	51	2	28	45	37
TN,W	143	29	7	5	-	6	25	6	19	4	-	14	-	11	8	9
OD	283	66	2	-	-	11	19	7	54	34	-	27		6	10	16

RA11

Table C-3A. (September 30, 2008—Continued)

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
9TH	39,860	6,918	343	154	463	457	695	308	14	64	3	47	530	40	2,389	1,421
AK	393	144	7	6	43	12	15	-	-	-	-	-	18	1	17	25
AZ	2,865	633	14	31	67	56	134	60	-	2	1	4	13	5	120	130
CA N	8,183	719	45	5	55	81	50	8	1	3	2	1	69	7	110	272
CA E	6,588	867	16	9	32	43	125	64	1	32		3	89	2	346	105
CA C	10,872	2,628	189	9	74	95	99	117	12	13	-	6	144	13	668	389
CA S	2,040	432	13	36	81	43	75	6	-	2	-	18	39	2	46	94
HI	537	105	5	8	16	13	4	1					7	2	6	43
ID	382	116	5	3	11	2	12	-		-	-	-	5	2	44	32
MT	553	157	11	17	20	4	33	3	-	-	-	-	5	-	27	36
NV	2,910	349	12	8	25	46	44	17		7	-	8	61	1	19	105
OR	2,393	703	12	7	20	31	37	1	-	2	-	6	23	1	484	73
WA E	552	205	4	8	12	12	28	-	-	-	-	-	15	-	96	30
WA W	2,059	439	10	7	21	29	72	29	-	2	-	1	31	4	186	88
GUAM	32	10	-	-	6	-	2	-	-	-	-	-	1	-	-	1
NMI	63	19	-	-	-	6	5	2	-	1	-	-	1	-	-	2
10TH	9,372	2,161	52	74	117	165	312	111	-	22	77	9	131	17	745	329
CO	2,225	515	4	9	24	43	76	50	-	6	54	-	23	4	130	112
KS	1,472	337	7	12	8	15	32	45	-	13	13	8	24	3	135	22
NM	1,731	366	10	7	49	53	73	1	-	-	-	-	46	5	67	55
OK N	806	194	8	11	6	4	27	3	-	-	-	-	5	1	102	17
OK E	389	162	1	7	6	4	7	1		1	-	-	4	-	133	5
OK W	1,125	238	9	12	9	24	34	-	-	-	-	1	3	3	100	37
UT	1,299	235	9	12	14	20	24	1	-	2	-		24	1	67	61
WY	331	107	4	4	1	2	69	-	-	-	-	-	2	-	5	20
11TH	28,129	4,238	189	381	163	191	721	181	7	34	26	10	208	24	1,596	467
AL N	3,539	408	10	7	13	21	55	13		2	-	-	28	1	237	21
AL M	996	215	9	1	7	13	44	2	-	-	-	1	10	1	126	5
AL S	638	141	7	4	3	4	42	2	-	-	-	-	5	-	53	11
FL N	1,441	403	23	1	15	25	85	17	-	-	6	-	70	1	144	36
FL M	11,982	1,303	38	129	62	36	153	101	3	23	17	3	36	6	551	145
FL S	4,756	361	52	226	33	33	197	35	3	3	3	2	36	3	190	146
GA N	3,027	431	24	11	15	39	87	7	1	6	-	4	45	9	119	63
GA M	1,050	230	9	1	3	9	38	2	-	-	-	-	27	1	106	29
GA S	700	146	3	1	5	11	40	2	-	-	-	-	11	2	38	12

Table C-3A. (September 30, 2008—Continued)

Circuit and District	Private Cases									Prisoner Petitions						
	Total Private Civil Cases	Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
9TH	32,932	3,660	469	62	191	220	3,236	818	4,860	6,342	254	4,556	117	2,344	2,135	3,698
AK	239	75	9	-	13	2	20	3	36	34	-	6	-	4	16	22
AZ	2,252	320	94	1	1	46	105	38	480	313	30	351	-	126	98	239
CA N	7,484	550	47	2	25	10	2,030	256	786	824	37	539	8	487	583	1,202
CA E	5,721	278	37	5	5	25	114	52	747	1,835	40	2,038	9	65	159	243
CA C	8,051	585	114	4	6	26	330	248	1,031	2,117	87	483	1	1,104	686	821
CA S	1,835	213	35	-	16	3	74	44	242	200	9	172	3	187	122	273
HI	432	94	5	-	29	5	47	12	142	4	-	23	-	14	20	33
ID	456	84	10	-	-	7	25	6	67	41	10	132	-	16	26	44
MT	396	89	10	3	-	17	54	14	55	32	-	53	-	4	20	35
NV	2,564	500	47	2	5	42	175	58	463	353	25	329	14	133	171	242
OR	1,690	211	14	6	6	21	92	45	393	384	5	123	81	74	103	126
WA E	347	51	4	12	-	5	30	7	98	20	1	40	1	10	23	45
WA W	1,629	285	26	15	76	10	116	35	297	82	2	187	2	101	123	255
GUAM	22	6	-	-	1	-	3	1	2	2	-	-	-	2	1	4
NMI	44	9	-	-	-	1	6	-	21	-	-	-	-	1	4	2
10TH	7,211	1,286	102	40	4	229	596	134	1,953	681	44	786	9	381	333	742
CO	1,710	345	6	11	2	38	114	28	365	161	1	223	-	107	74	221
KS	1,135	190	6	11	-	44	100	35	241	59		156	2	37	78	165
NM	1,255	188	26	5	-	66	127	17	587	72	-	100	-	30	51	86
OK N	606	120	5	3		12	31	10	180	101	15	19	-	15	47	48
OK E	220	17	6	2	1	9	13	3	63	41	2	48	1	1	6	7
OK W	847	157	10	3	-	19	72	9	270	68	23	105	5	25	27	94
UT	1,054	229	20	3	1	20	98	20	158	51	3	121	1	144	43	107
WY	224	35	11	2	-	21	43	2	39	24	-	23	-	2	7	14
11TH	23,891	2,426	288	9	215	301	7,348	333	3,095	2,008	131	1,734	25	602	3,923	1,455
AL N	3,131	267	22	1	-	48	102	26	478	107	25	180	-	28	1,763	146
AL M	761	86	4	-	-	34	71	16	175	106	9	205	1	5	39	30
AL S	497	127	6	-	13	19	29	24	102	44	6	83	-	3	19	21
FL N	1,038	117	7	-	4	21	58	6	231	255	14	244	-	17	35	29
FL M	10,679	603	54	2	35	62	6,189	81	725	942	55	289	6	179	1,044	413
FL S	3,795	692	126	3	151	19	361	66	472	224	12	222	9	179	788	471
GA N	2,596	403	55	-	2	55	447	93	615	150	5	162	8	164	169	268
GA M	820	66	10	-	1	34	59	12	206	92	3	183	-	19	51	44
GA S	554	65	4	3	9	18	32	9	91	88	2	186	1	10	15	23

*FELA = FEDERAL EMPLOYERS LIABILITY ACT

RA13

Table C-3.
U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2007

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Prisoner Petitions										Forfeitures and Penalties	Labor Suits	Social Security	All Other
			Contract	Real Property	Tort Actions	Civil Rights	Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other				
TOTAL	257,507	45,464	3,412	1,742	2,046	2,598	5,896	3,285	14	1,001	245	855	2,272	441	12,974	8,683
DC	2,415	1,102	31	-	40	283	30	149		178	4	19	44	7	21	496
1ST	5,890	1,420	33	103	84	68	181	138	-	34	3	23	84	17	289	383
ME	449	117	-	3	3	7	23	1	-	-	1	-	8	-	56	15
MA	3,131	734	23	3	42	26	54	134		28	1	21	23	8	76	305
NH	450	112	1	1	8	7	17				-	-	18	2	30	28
RI	583	107	-	-	4	3	13	2	-	-		-	8	6	54	17
PR	1,267	340	3	96	27	25	74	1	-	6	1	2	27	1	53	18
2ND	27,165	3,249	182	84	173	186	329	225	1	32	13	108	210	69	945	692
CT	2,050	456	23	2	16	33	26	28	-	4		32	27	9	50	100
NY N	1,484	312	5	-	19	18	23	-	-			-	47	2	184	16
NY E	5,751	1,078	111	11	78	60	67	102	-	15	1	45	25	34	232	297
NY S	16,125	1,001	26	12	47	53	182	40	1	9	11	31	49	22	270	248
NY W	1,492	424	13	48	10	11	23	52	-	3	1	-	58	1	184	20
VT	263	73	1	11	3	5	8	3	-	1	-		4	1	25	11
3RD	32,521	3,360	123	240	153	192	253	580	2	151	13	150	126	23	839	535
DE	870	73	4	1	5	4	9	-	-	-	-	2	9		28	11
NJ	6,557	1,003	42	7	61	59	60	201		13	-	106	38	9	205	202
PA E	19,739	885	37	21	47	73	113	69		3	-	35	8	6	277	207
PA M	2,415	706	5	86	12	19	42	275	2	123	3	5	9	-	105	19
PA W	2,479	592	30	109	14	24	26	23	-	12	10	-	57	7	224	54
VI	363	101	5	16	14	12	1	2	-	-	-	2	5	1	-	42
4TH	17,331	4,111	136	186	159	190	883	243	-	107	25	147	278	18	1,264	474
MD	3,601	919	43	6	50	83	118	5	-	7	-	62	103	5	227	210
NC E	1,367	553	31	3	12	18	92	64	-	16	9	73	47	2	172	24
NC M	1,003	278	11	-	4	12	111	-	-	-	1	-	36	3	83	17
NC W	1,043	254	18	5	5	6	116	8	-	2		1	17	2	64	14
SC	4,403	607	10	189	24	13	130	24	-	9	5	-	16	1	175	27
VA E	3,239	555	7	2	27	46	149	29	-	15	6	7	31	3	81	132
VA W	1,146	449	3	2	13	5	87	33	-	26	-	2	11	-	250	17
WV N	633	295	2	1	11	2	46	66	-	26	4	2	7	1	61	6
WV S	896	201	8	1	13	6	44	16	-	6			9	1	151	7

Table C-3. (September 30, 2007—Continued)

Circuit and District	Total Private Civil Cases	Private Cases														
		Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions				Copyright, Patent, Trademark	Labor Suits	All Other
										Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other			
TOTAL	212,043	30,527	3,438	534	1,695	3,780	49,527	3,864	29,158	18,907	232	22,779	731	10,781	18,233	17,984
DC	1,113	164	21	-	-	22	137	14	301	29	-	64	2	50	116	193
1ST	4,470	783	91	21	52	69	622	156	837	221	1	277	17	350	392	581
ME	532	52	6	1	3	6	31	6	74	21	-	25	-	28	25	46
MA	2,387	426	32	19	35	28	289	116	349	129	1	140	11	220	237	355
NH	338	52	4	-	1	4	34	4	67	38	-	54	2	30	13	37
RI	486	89	30	-	4	7	90	23	76	24	-	15	-	39	32	57
PR	927	154	19	1	9	24	178	7	271	11	-	43	4	35	85	86
2ND	23,916	3,343	107	98	122	397	8,319	323	3,311	957	2	1,545	28	1,264	1,781	2,319
CT	1,700	266	16	14	8	37	131	47	457	43	-	129	3	115	113	317
NY,N	1,136	117	6	11	5	20	113	16	237	171	-	257	-	50	54	79
NY,E	4,873	502	44	21	34	173	762	69	949	271	-	206	8	248	655	731
NY,S	15,124	2,339	30	51	75	129	7,178	171	1,401	321	2	721	17	768	880	1,041
NY,W	1,068	76	8	1	-	28	103	14	233	134	-	204	-	67	67	132
VT	215	41	1	-	-	9	32	6	54	17	-	28	-	16	12	19
3RD	28,161	2,402	303	109	59	542	15,273	339	3,031	1,130	17	1,788	42	917	1,273	1,870
DE	797	64	2	1	2	15	14	6	99	56	3	153	-	178	32	168
NJ	5,654	971	170	11	32	193	911	132	885	153	-	544	14	420	621	817
PA,E	18,853	852	46	83	10	217	14,084	146	1,217	478	9	458	17	229	313	604
PA,M	1,711	223	96	2	-	73	110	23	342	209	3	361	3	38	85	141
PA,W	1,884	284	16	12	13	27	102	28	471	230	2	260	5	60	207	188
VI	262	29	33	-	2	17	52	4	37	4	-	6	3	2	5	88
4TH	13,220	1,803	188	8	48	409	1,863	244	1,636	1,249	8	2,947	191	642	973	1,013
MD	2,982	384	60	2	10	121	259	75	408	97	1	447	131	98	230	345
NC,E	814	117	10	-	11	10	69	10	132	100	2	156	3	89	51	64
NC,M	726	88	9	-	-	7	84	10	115	109	-	118	4	102	19	49
NC,W	789	133	10	-	-	15	238	9	116	38	1	55	2	73	49	56
SC	3,796	410	27	-	12	114	641	30	388	340	-	1,311	20	98	307	98
VA,E	2,684	353	18	3	10	58	366	67	311	321	1	503	24	149	210	290
VA,W	897	83	32	-	-	19	50	16	74	112	1	220	1	17	37	35
WV,N	398	92	11	1	1	24	57	12	26	60	-	53	5	4	26	26
WV,S	629	119	11	2	4	41	99	15	66	72	-	83	1	12	44	60

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Table C-3. (September 30, 2007—Continued)

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Prison Civil Rights	Prisoner Petitions: Prison Condition	Prisoner Petitions: Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
5TH	34,662	5,578	1,176	250	351	252	869	598	1	173	8	26	230	40	912	670
LA E	10,484	669	171	193	145	23	21	4	-	1	1	3	2	2	56	42
LA M	999	132	6	-	9	3	28	1	-	-	-	-	2	1	40	42
LA W	2,458	441	20	13	41	7	46	109	-	8	4	1	5	6	159	22
MS N	947	99	11	7	2	10	13	-	-	-	-	-	8	-	45	3
MS S	2,702	247	27	7	27	15	33	74	-	4	1	1	10	5	29	14
TX N	4,213	780	23	7	18	45	129	132	-	13	1	5	20	8	165	214
TX E	3,222	582	8	1	13	12	161	128	-	117	1	5	14	1	128	50
TX S	6,434	1,808	867	6	39	69	288	81	1	22	-	8	34	15	156	172
TX W	3,133	616	45	8	57	68	230	67	-	8	-	3	55	2	134	111
6TH	21,322	4,611	735	284	155	254	380	170	4	86	4	37	163	68	1,686	574
KY E	1,804	835	3	117	26	8	31	102	-	40	1	1	8	1	459	38
KY W	1,309	327	8	103	15	11	19	4	-	16	-	6	9	-	115	21
MI E	5,530	1,353	629	14	31	100	62	28	-	6	1	11	51	17	202	191
MI W	1,593	208	11	1	6	21	38	3	-	-	1	-	10	7	84	26
OH N	4,543	586	33	4	36	22	71	14	-	14	-	5	6	17	268	96
OH S	2,836	602	31	3	12	40	47	6	3	3	-	12	32	13	289	111
TN E	1,131	244	6	6	4	8	58	-	-	1	1	-	2	10	124	24
TN M	1,548	236	7	34	11	16	24	1	-	3	-	-	15	4	74	47
TN W	1,128	220	7	2	14	28	40	12	1	3	-	2	20	-	71	20
7TH	15,584	2,225	104	137	112	143	322	55	-	23	17	17	140	41	547	551
IL N	7,620	915	24	9	52	89	105	13	-	12	8	15	23	16	118	433
IL C	1,009	182	13	39	2	10	35	1	-	-	4	1	6	8	53	10
IL S	1,025	173	10	20	20	9	22	26	-	6	4	-	13	1	23	19
IN N	1,516	242	13	30	7	7	37	-	-	-	-	-	22	6	106	14
IN S	2,411	316	30	23	17	18	45	2	-	1	3	1	23	5	129	21
WI E	1,231	224	11	4	11	5	41	3	-	-	-	-	40	2	79	28
WI W	782	171	3	12	3	5	37	10	-	14	-	-	19	3	39	26
8TH	15,589	2,869	121	108	90	155	490	128	3	22	30	16	154	26	1,235	310
AR E	2,063	323	11	10	11	23	24	32	-	6	27	-	7	1	159	12
AR W	803	268	7	8	9	7	11	-	1	-	1	-	9	1	207	7
IA N	549	248	6	16	-	5	57	4	-	1	-	-	18	2	131	8
IA S	729	240	7	13	4	7	55	3	-	-	-	5	12	3	119	7
MN	5,412	332	14	11	11	12	48	28	-	3	-	-	11	7	75	92
MO E	2,414	453	14	4	15	41	85	9	1	10	-	4	43	3	173	51
MO W	2,037	623	22	1	12	42	104	41	1	1	2	4	27	4	295	67
NE	891	230	12	24	10	5	63	3	-	-	-	2	21	3	41	46
ND	293	55	2	10	3	3	19	2	-	1	-	1	3	2	9	9
SD	418	117	6	6	15	10	32	7	-	-	-	-	3	-	26	12

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Table C-3. (September 30, 2007—Continued)

Circuit and District	Private Cases																
	Total Private Civil Cases	Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions				Copyright, Patent, Trademark	Labor Suits	All Other
										Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other			
5TH	20,086	9,112	429	75	761	763	4,688	678	2,603	3,280	67	2,849	74	1,352	983	1,453
LA,E	9,816	5,490	62	9	366	160	2,630	170	231	227	1	162	3	45	94	176
LA,M	867	121	9	1	8	55	122	18	180	88	-	171	1	10	24	58
LA,W	2,027	470	24	-	126	119	219	234	189	187	-	309	-	45	77	48
MS,N	848	142	6	2	4	48	144	22	187	95	6	160	-	11	25	17
MS,S	2,455	664	81	1	13	120	360	44	228	161	3	283	7	38	64	68
TX,N	3,433	601	82	1	1	39	186	68	514	822	15	523	25	232	165	209
TX,E	2,640	393	16	35	20	130	212	23	208	555	4	449	19	408	74	94
TX,S	4,626	743	142	25	213	78	561	69	487	718	23	489	11	295	294	472
TX,W	2,375	288	34	1	-	35	154	30	369	456	9	393	8	268	188	232
6TH	16,711	2,037	1,514	64	64	340	2,080	344	3,001	1,858	31	1,487	35	665	1,428	1,793
KY,E	768	180	26	4	5	64	110	26	132	51	1	60	1	24	53	50
KY,W	982	180	18	1	20	48	130	14	154	75	2	118	8	34	96	84
MI,E	4,227	557	75	17	19	60	167	85	714	782	-	300	4	101	401	865
MI,W	1,385	130	6	2	3	14	37	65	176	271	1	380	1	44	78	174
OH,N	3,957	374	972	17	3	32	1,013	45	502	268	8	89	15	119	279	211
OH,S	2,234	252	385	11	5	24	109	55	526	186	7	91	3	112	274	174
TN,E	937	137	12	8	-	49	128	12	232	51	3	108	-	34	80	85
TN,M	1,312	123	6	2	3	25	289	22	294	94	3	189	2	74	111	92
TN,W	908	114	7	2	6	33	99	20	271	70	5	142	1	33	56	48
7TH	13,168	1,610	87	61	33	207	869	358	2,879	1,088	3	1,488	19	717	2,186	1,704
IL,N	6,705	878	45	14	14	75	295	263	1,525	165	-	382	3	427	1,488	1,130
IL,C	827	57	9	5	2	5	51	7	164	95	-	227	2	29	96	68
IL,S	852	80	9	19	13	38	212	22	117	33	-	157	-	13	69	70
IN,N	1,274	125	6	8	1	42	87	14	350	187	1	188	5	47	141	84
IN,S	2,083	247	12	7	3	41	155	27	535	363	2	235	7	71	217	170
WI,E	1,007	133	1	9	-	5	45	19	194	149	-	133	2	57	135	134
WI,W	611	80	4	1	-	1	24	15	93	56	-	166	-	73	40	38
8TH	12,688	1,279	67	25	9	201	4,730	435	1,604	845	4	1,504	19	377	897	674
AR,E	1,740	118	9	9	2	39	749	29	229	116	4	333	-	15	45	38
AR,W	535	81	9	2	-	23	68	17	98	19	-	141	-	13	43	21
IA,N	301	30	2	2	-	2	35	5	71	40	-	54	-	18	19	23
IA,S	539	65	4	2	-	10	45	12	126	54	-	107	2	33	32	47
MN	5,080	283	13	1	-	21	3,316	141	312	119	-	73	-	135	388	209
MO,E	1,861	219	14	2	4	36	315	199	333	183	-	288	-	86	190	84
MO,W	1,414	211	9	-	2	38	111	21	261	184	-	311	10	38	124	92
NE	661	172	3	7	-	18	30	5	123	47	-	113	2	25	24	72
ND	138	34	4	-	-	3	22	2	19	10		10		11	10	14
SD	301	53	-	-	-	11	39	4	36	63	-	54	3	2	12	24

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Table C-3. (September 30, 2007—Continued)

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions						Forfeitures and Penalties	Labor Suits	Social Security	All Other
							Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other				
9TH	40,637	9,328	424	81	458	507	802	536	1	82	2	244	424	79	2,732	2,752
AK	347	137	6	2	28	14	14		-	-	1	-	8	2	33	29
AZ	3,477	816	32	4	43	29	339	110	-	2	1	17	32	3	136	70
CA N	7,074	1,209	51	8	63	101	32	29	-	5	-	7	31	17	122	743
CA E	4,595	770	18	9	39	24	40	132		20	-	15	51	3	304	115
CA C	11,904	3,064	239	5	111	95	127	164	1	23	-	45	150	22	1,006	1,077
CA S	2,829	643	27	3	60	42	87	13		12	-	74	46	5	76	198
HI	563	112	4	6	15	13	25	-	-	1		1	9	-	3	35
ID	542	102	2	3	4	9	16	1	-	-	-	-	4	3	32	28
MT	820	209	11	29	21	7	50	1	-	-	-	-	11	1	60	18
NV	2,463	402	10	2	17	108	49	34	-	14	-	46	23	2	13	86
OR	2,524	757	14	4	13	21	38	8		2	-	38	18	4	499	98
WA E	640	268	5	3	10	12	38	6			-	-	10	-	164	20
WA W	2,674	908	15	3	33	30	39	137		2	-	-	27	8	264	230
GUAM	38	17	-	-	2	1	6	1	-	-	-	-	4		1	2
NMI	47	12	-	-	-	3	2	2	-	1	-	1	-	-		3
10TH	9,994	2,457	81	175	118	156	367	114	1	39	82	9	140	23	757	395
CO	2,798	819	7	24	31	41	30	64	1	13	78	-	38	10	130	152
KS	1,551	383	15	34	5	22	53	44	-	18	3	2	19	2	139	25
NM	1,449	355	12	3	42	33	125	1	-	1	1	1	38	5	61	32
OK N	745	196	7	35	3	5	27	3	-	-	-	-	11	2	67	10
OK E	487	165	4	12	4	3	15	1	-	1	-	-	5		105	15
OK W	1,536	391	20	69	25	20	24	1		-	-	6	1	3	161	68
UT	1,141	278	11	4	7	29	89	-		4	-	-	18	1	67	66
WY	289	72	5	1	1	3	24	-	-	1			10	-	7	20
11TH	34,407	4,836	254	94	152	212	860	268	1	64	44	59	272	38	1,767	851
AL N	4,843	574	23	3	18	22	38	23		3	-	2	25	6	365	25
AL M	1,187	204	8	2	4	10	34	5	-	1	1	-	19	-	111	9
AL S	883	158	9	-	4	7	34	4	-	-	-	1	6	-	60	5
FL N	1,635	363	19	3	10	24	76	38		-	14	3	22	2	139	12
FL M	12,660	1,411	37	69	50	38	264	79	-	43	22	17	49	10	547	185
FL S	7,072	1,193	80	10	33	49	234	61	1	6	2	14	60	12	175	446
GA N	3,900	586	53	4	17	52	112	51		10	5	21	60	7	160	133
GA M	1,210	217	5	1	5	2	40	4		-	-	-	16	-	121	23
GA S	920	130	10	2	11	8	28	2		1	-	1	15	1	40	11

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Table C-3. (September 30, 2007—Continued)

Circuit and District	Total Private Civil Cases	Private Cases														
		Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Conditions and Civil Rights	Prisoner Petitions: Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
9TH	31,309	3,712	232	35	204	224	2,485	533	4,768	5,183	38	4,731	195	2,968	2,294	3,708
AK	210	52	3		6	4	20	8	41	19	-	14	-	1	18	20
AZ	2,659	381	20	1	-	27	124	39	481	387	3	779	14	161	86	216
CA N	5,865	478	36	1	22	14	1,059	59	631	784	5	726	12	529	517	884
CA E	3,825	231	29	5	1	26	188	31	585	1,146	2	1,154	12	76	127	212
CA C	8,840	1,086	47	7	15	33	371	213	1,146	1,560	7	701	7	1,564	305	1,078
CA S	4,189	242	14	-	16	5	108	42	467	328	-	324	14	180	92	354
HI	561	101	8		20	3	47	11	154	27	-	47	-	22	32	79
ID	440	71	10	-	-	13	31	8	70	50	-	111	2	16	17	41
MT	411	89	15	2	-	20	46	9	45	36	-	66	-	3	25	35
NV	2,061	403	9	1	4	25	141	38	381	248	19	264	20	186	101	223
OR	1,767	220	18	1	12	31	68	41	415	316	2	170	113	79	111	172
WA E	372	45	10	6	-	9	21	4	78	46	-	80	1	12	21	39
WA W	2,066	323	15	11	107	11	256	80	298	148	-	253	-	140	233	240
GUAM	21	7			-	1	1	-	5	-	-	2	-	-	2	3
NMI	35	5			1	2	4	-	13	-	-	-	-	-	0	1
10TH	7,937	1,280	86	33	5	216	783	101	1,743	748	10	984	15	383	348	814
CO	2,177	356	34	11	3	41	150	21	370	216	-	380	-	133	92	373
KS	1,168	182	5	9	-	42	100	23	280	113	-	161	5	40	80	110
NM	1,094	153	17	6	-	43	126	12	418	73	-	86	-	26	29	95
OK N	549	123	11	2	-	11	60	6	153	62	2	30	3	25	43	28
OK E	322	36	5	5	1	18	45	2	81	46		57	-	3	8	15
OK W	1,145	184	10	-		22	127	16	279	187	7	152	5	37	31	86
UT	865	187	3	-	1	13	143	15	126	31	1	69	2	119	36	96
WY	217	39	11	-	-	28	38	4	36	28	-	19	-	3	9	2
11TH	28,471	3,022	243	2	259	374	7,712	339	3,344	2,332	53	3,155	94	1,075	5,570	1,898
AL N	4,269	273	21	1	2	69	147	32	501	177	7	283	3	32	2,580	101
AL M	903	100	2	-		38	56	14	245	80	3	315	10	17	41	56
AL S	821	195	15	-	14	24	55	44	97	170	1	107	1	20	26	52
FL N	1,272	138	8	-	5	13	46	8	280	242	5	337	10	56	59	58
FL M	11,249	682	24	-	28	63	6,401	64	754	682	27	640	29	306	1,165	404
FL S	5,879	1,040	36	-	202	38	641	69	585	391	5	332	19	355	1,476	720
GA N	3,215	473	72	-	1	81	273	79	603	322	3	518	16	244	173	397
GA M	953	85	10	-	1	28	55	9	159	161	1	147	2	31	48	58
GA S	759	80	58	1	5	20	38	20	110	107	1	276	4	14	22	34

* FELA = FEDERAL EMPLOYERS LIABILITY ACT

RA19

Table C-3A.
U.S. District Courts—Civil Cases Pending, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2007

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Prisoner Petitions										Forfeitures and Penalties	Labor Suits	Social Security	All Other
			Contract	Real Property	Tort Actions	Civil Rights	Motions to Vacate Sentence	Habeas Corpus General	Death Penalty	Prison Civil Rights	Prison Condition	Mandamus and Other				
TOTAL	265,682	38,839	1,821	1,788	2,230	2,970	5,427	1,940	34	702	173	412	2,121	318	12,539	6,354
DC	2,762	1,480	72	1	47	394	74	132	-	125	2	11	52	11	29	530
1ST	6,452	1,256	37	70	98	110	223	55	-	35	3	9	101	14	233	281
ME	297	57	-	-	5	8	9	-	-	-	-	-	6	-	31	10
MA	3,162	592	19	2	45	37	59	53	-	28	3	9	25	7	78	220
NH	417	93	-	-	8	7	6	-	-	-			16	3	17	24
RI	834	114	4	-	8	4	15	-	-	1	-	-	7	4	61	14
PR	1,712	410	5	68	31	56	132	2	-	6	-	-	47	-	48	15
2ND	37,347	3,581	125	72	266	256	436	144	1	33	19	60	210	38	1,247	686
CT	2,426	234	14	1	24	45	23	21	-	5	-	9	24	3	43	72
NY,N	2,445	613	5	2	37	23	35	1	-	-			37	3	443	21
NY,E	8,164	1,097	69	21	111	97	137	44		12	1	24	43	10	254	275
NY,S	21,569	1,087	19	8	72	67	208	47	1	10	14	27	51	12	281	270
NY,W	2,480	450	13	32	19	19	29	31	-	4	-	-	45	1	208	42
VT	263	50	-	8	3	5	4			2	-	-	9	1	12	6
3RD	37,478	2,599	65	162	187	220	363	248	2	130	18	53	88	31	697	444
DE	1,315	111	2	2	8	6	20		-	-	-	2	12	2	37	20
NJ	5,872	728	22	6	73	74	68	66	-	19	-	30	23	10	179	154
PA,E	24,784	601	14	17	35	56	87	26		3		16	6	5	210	130
PA,M	2,032	457	6	31	15	24	44	112	2	96	5	-	12	-	98	15
PA,W	2,086	435	10	68	17	27	27	20	-	9	11	-	26	3	174	43
VI	1,279	267	11	36	34	33	17	24	-	4	-	5	7	5	1	82
4TH	13,066	3,461	86	111	155	200	765	175	-	68	23	69	244	13	1,240	323
MD	2,931	674	41	5	45	84	61	1	-	4	-	11	65	4	217	116
NC,E	1,247	527	27	7	15	26	90	40	-	10	10	55	54	1	160	32
NC,M	560	314	4	-	11	14	102	1		1	-	-	39	3	124	15
NC,W	787	206	7	2	4	12	76	-	-	-	-	-	28	1	56	20
SC	3,007	534	9	91	22	17	159	13	-	7	2	-	16	-	174	24
VA,E	1,838	289	1	1	26	32	52	17		11	7	1	15	2	58	76
VA,W	660	262	2	2	11	4	31	6		5	-	-	12	-	185	14
WV,N	730	302	1	2	10	6	80	78	-	22	4	2	7	1	72	6
WV,S	996	343	3	-	11	5	85	19	-	8		-	8	1	184	18

RA20

Table C-3A. (September 30, 2007—Continued)

Circuit and District	Private Cases															
	Total Private Civil Cases	Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Conditions and Civil Rights	Prisoner Petitions: Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
TOTAL	226,243	27,952	2,705	713	1,618	3,863	73,874	4,147	32,292	18,071	781	17,660	324	9,366	14,372	18,516
DC	1,282	172	20	1	-	27	169	27	348	18	-	58	1	56	108	277
1ST	5,186	868	93	37	90	82	987	147	1,103	213	1	282	14	334	427	537
ME	230	43	5	-	5	5	75	8	58	7	-	16	-	17	18	27
MA	2,610	505	33	36	64	35	310	105	451	140	1	123	10	218	253	326
NH	334	50	2	-	1	3	38	8	73	32	-	68	2	23	11	22
RI	720	102	35	-	6	6	342	15	76	20	-	11	-	27	24	50
PR	1,302	169	18	1	14	33	272	13	447	14	-	43	2	49	121	108
2ND	33,766	3,592	143	153	191	516	12,543	581	5,157	1,708	-	2,120	18	1,431	1,902	3,711
CT	2,142	309	23	22	10	49	137	53	758	60	-	183	-	85	115	338
NY N	1,832	135	16	21	11	37	128	28	393	316	-	543	-	48	85	70
NY E	7,087	608	57	27	51	194	6,950	109	1,551	444	-	164	7	324	680	862
NY S	20,482	2,359	37	80	109	178	10,165	366	1,972	548	-	656	10	804	831	2,277
NY W	2,030	117	8	2	-	49	117	20	449	324	-	518	1	99	176	150
VT	213	34	2	1	-	9	38	4	34	16	-	37	-	11	15	14
3RD	34,879	2,273	373	133	77	511	21,756	340	3,318	835	48	1,327	23	966	889	2,001
DE	1,204	108	2	1	8	19	14	10	163	74	4	181	-	283	35	312
NJ	5,244	940	159	17	40	184	892	124	1,070	100	2	425	4	437	414	521
PA E	24,193	651	32	92	11	176	20,492	131	980	291	18	212	6	146	248	597
PA M	1,575	215	54	8	-	71	112	31	414	183	11	277	2	29	76	92
PA W	1,651	231	16	15	7	24	83	28	537	158	13	232	5	55	110	137
VI	1,012	128	110	-	11	37	253	16	144	29	-	20	6	5	16	242
4TH	9,605	1,552	166	6	55	344	1,143	224	1,485	789	29	1,472	50	467	643	1,180
MD	2,257	301	45	2	8	110	198	64	361	60	2	233	20	66	152	626
NC E	720	121	10	-	19	6	68	7	155	66	13	119	-	37	44	55
NC M	566	93	6	-	-	6	42	10	112	59	6	83	-	69	17	57
NC W	593	151	7	-	-	14	52	10	117	21	3	17	-	70	44	76
SC	2,473	341	23	-	12	99	410	50	377	234	1	573	5	91	186	71
VA E	1,539	250	10	3	9	33	208	35	185	151	3	241	11	98	107	195
VA W	378	64	42	-	-	15	38	15	63	30	1	52	-	13	23	22
WV N	428	107	12	-	1	25	51	12	32	66	-	61	4	10	20	21
WV S	651	118	11	1	6	36	75	21	83	102	-	93	-	7	44	55

RA21

Table C-3A. (September 30, 2007—Continued)

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Prison Civil Rights	Prisoner Petitions: Prison Condition	Prisoner Petitions: Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
5TH	37,123	4,688	637	264	326	265	904	354	4	119	5	17	199	33	888	493
LA E	16,076	653	192	196	130	25	15	3	-	-	-	1	3	1	64	34
LA M	2,317	93	3	4	11	2	13	1	-	1			1	1	38	18
LA W	2,266	425	15	30	47	15	59	34		2	1	-	4	7	102	25
MS N	1,316	134	9	8	5	13	36	1	-	-	-		9	1	45	7
MS S	2,974	266	14	9	25	21	36	64	-	4	2	1	22	2	39	28
TX N	2,979	565	17	6	10	47	92	64	1	16	1	4	16	6	108	120
TX E	2,765	584	3	3	13	15	102	112	2	83	1	6	18	1	167	57
TX S	4,418	1,214	376	1	32	74	353	38	1	10	-	3	45	11	169	147
TX W	2,353	667	14	6	62	52	198	37	-	3		2	81	3	128	91
6TH	22,311	3,697	181	214	159	264	412	54	5	40	4	14	217	49	1,616	468
KY E	1,446	633	3	66	25	8	30	13	1	19	2	1	10	1	408	44
KY W	1,235	274	7	67	18	16	13	1	-	6	-	2	20	-	86	38
MI E	5,558	705	116	11	25	72	70	18	-	1	1	2	63	11	193	122
MI W	1,419	184	4	5	5	13	19	2		-	-	-	22	5	85	26
OH N	5,329	445	13	3	27	30	56	4	-	9	-	4	4	6	230	59
OH S	3,036	624	20	3	15	50	48	5	4	2		4	56	10	307	108
TN E	1,382	286	5	6	9	14	106	-			1		4	11	109	21
TN M	1,571	239	7	51	15	20	22	-	-			-	11	3	139	31
TN W	1,275	247	6	2	20	41	50	11	-	3		1	27	2	65	19
7TH	14,813	1,897	118	88	115	161	206	44		18	12	8	85	26	527	399
IL N	7,066	739	84	7	52	108	79	6		5	4	7	13	9	133	287
IL C	961	148	7	19	3	6	21	2	-	1	1	1	10	5	60	10
IL S	1,057	196	5	15	28	11	30	34	-	6	5		9	1	25	27
IN N	1,470	176	3	20	5	9	18	-	-	-			12	4	69	15
IN S	2,889	265	12	20	16	19	23	-	-	3	1		13	4	129	27
WI E	1,339	198	7	3	9	5	25	1	-	-	1		20	2	69	24
WI W	291	57		4	1	1	10	1	-	5	-	-	3	1	22	9
8TH	17,338	2,353	58	97	103	152	379	65	6	13	22	7	133	16	1,074	240
AR E	4,748	280	6	9	14	20	12	17	-	2	19	1	6	1	169	14
AR W	784	235	4	7	10	6	6	-	1	-	1		8	-	181	9
IA N	457	287	5	8	-	4	68	2	-	1	-	-	14	-	82	3
IA S	797	215	5	16	5	6	42	1	-	-	-	3	15	3	105	11
MN	5,238	262	11	3	13	14	22	23		6			16	4	68	82
MO E	1,588	406	7	3	14	42	109	3	2	4		2	24	3	167	26
MO W	1,573	439	11	1	7	42	48	14	3	-	2	1	19	3	247	46
NE	639	140	5	21	12	5	21	-	-	-	-		18	2	28	28
ND	204	51	-	13	7	2	9	-	-	-	-	-	5	-	7	8
SD	399	115	1	6	20	11	22	5	-	-	-	-	8	-	24	13

RA22

Table C-3A. (September 30, 2007—Continued)

Circuit and District	Total Private Civil Cases	Private Cases								Prisoner Petitions						
		Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
5TH	32,515	7,458	352	77	848	645	12,498	569	2,742	2,126	129	1,828	28	974	889	1,152
LA E	15,418	4,362	94	8	413	154	9,311	197	209	253	1	98	-	21	76	155
LA M	2,204	136	10	1	13	57	1,627	19	160	40	1	119	-	12	34	55
LA W	1,841	481	28	2	168	129	222	81	243	101	1	193	-	20	108	53
MS N	1,181	170	18	2	6	130	384	29	227	60	18	78	-	13	27	27
MS S	2,306	768	84	2	21	125	243	47	372	172	14	292	-	25	58	71
TX N	2,418	371	29	6	1	31	105	56	444	548	24	323	9	140	130	200
TX E	2,187	300	17	35	20	123	177	26	200	370	18	247	7	460	80	101
TX S	3,204	803	43	19	200	80	319	70	463	338	39	307	2	139	252	355
TX W	1,686	246	20	2	-	36	110	34	364	244	15	179	2	135	150	140
6TH	18,614	2,173	810	86	83	380	4,267	370	3,349	2,052	104	1,127	13	590	1,315	1,790
KY E	813	175	25	4	4	62	134	37	169	36	3	23	1	22	57	64
KY W	1,021	212	18	4	24	61	151	16	183	51	4	103	1	24	84	72
MI E	4,853	545	58	19	31	47	439	103	815	975	1	458	4	177	409	875
MI W	1,235	115	10	4	4	15	31	52	161	314	1	324	1	38	69	96
OH N	4,686	357	408	20	6	29	2,781	47	429	281	25	51	3	100	203	144
OH S	2,412	324	313	18	6	28	114	58	620	202	49	87	-	98	266	229
TN E	1,098	184	16	10	-	74	148	17	325	47	7	79	-	32	72	85
TN M	1,272	115	56	3	7	25	369	20	316	64	8	84	-	69	80	58
TN W	1,025	145	10	3	5	39	100	25	331	84	5	132	-	30	55	57
7TH	12,386	1,638	145	84	35	250	765	430	3,342	633	5	1,312	6	602	1,428	1,631
IL N	6,287	851	58	32	14	70	355	334	1,729	158	4	243	-	364	861	1,034
IL C	813	78	9	9	7	14	46	7	218	82	-	421	1	20	79	42
IL S	881	89	8	17	11	45	84	16	139	44	-	262	1	6	78	50
IN N	1,284	181	13	10		63	92	23	439	74	1	105	1	40	147	155
IN S	1,924	283	55	3	3	52	132	34	567	156	-	176	2	59	183	219
WI E	943	123	8	12	-	4	35	11	221	130	-	151	1	78	68	126
WI W	254	33	3	1	-	1	11	5	73	9	-	54	-	33	11	13
8TH	14,985	1,947	60	23	11	242	8,288	368	1,648	609	19	1,032	12	368	737	491
AR E	4,458	97	7	8	2	44	3,568	25	265	103	10	221	3	89	40	43
AR W	471	61	5	2	-	27	58	11	91	7	3	146	-	9	40	10
IA N	250	44	2	1	-	2	33	6	78	14	-	25		12	22	11
IA S	582	69	6	4	1	11	70	19	189	40	-	93	1	27	32	40
MN	5,577	267	19	2	1	27	4,056	130	329	70	-	86	1	157	304	156
MO E	1,584	407	7	3	4	41	220	134	267	241	6	167	1	82	147	75
MO W	1,136	207	13	2	2	61	110	27	255	52	-	181	2	35	100	86
NE	489	94	4	7	-	17	38	8	126	55		77	2	17	23	41
ND	151	43	3	2		8	25	2	15	4	-	20	-	12	8	11
SD	279	56	2	1		14	48	6	52	23	-	36	2	7	12	18

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RA23

Table C-3A. (September 30, 2007—Continued)

Circuit and District	Total Civil Cases	U.S. Cases														
		Total U.S. Civil	Contract	Real Property	Tort Actions	Civil Rights	Prisoner Petitions: Motions to Vacate Sentence	Prisoner Petitions: Habeas Corpus General	Prisoner Petitions: Death Penalty	Prisoner Petitions: Prison Civil Rights	Prisoner Petitions: Prison Condition	Prisoner Petitions: Mandamus and Other	Forfeitures and Penalties	Labor Suits	Social Security	All Other
9TH	48,327	7,856	282	168	489	566	779	410	13	67	4	141	447	53	2,582	1,654
AK	409	165	8	7	39	17	10	-	-		1		12	2	29	31
AZ	3,969	608	16	8	57	56	192	94	-	4	1	17	23	5	145	80
CA N	8,318	901	46	8	56	110	56	20	1	5	1	8	57	13	140	382
CA E	5,429	841	17	7	41	18	147	98	1	31	-	11	86	5	354	185
CA C	9,944	2,115	106	4	82	98	97	104	11	12	-	15	121	10	980	507
CA S	2,134	482	14	7	69	47	78	7		3		38	34	2	72	111
H	825	119	5	5	19	24	13	-	-	-	1	1	9		4	37
ID	621	112	1	5	7	8	7	-					6	2	34	42
MT	648	205	9	26	26	11	40	4	-				6	2	58	31
NV	2,831	382	9	9	26	73	48	31	-	8	-	32	30	3	77	91
OR	2,504	725	6	2	16	31	34	8	-	1	-	20	25	3	497	97
WA E	550	193	6	7	11	15	30	1	-	-	-	-	15	-	84	24
WA W	2,136	489	9	5	33	33	23	41		2	-	1	18	6	201	117
GUAM	44	17	-	-	6	2	2	-	-	-	-	-	4			3
NMI	56	13	-	-	1	5	2	2	-	1	-	-	1			1
10TH	8,979	2,881	51	114	124	178	266	86	-	29	45	5	126	15	716	334
CO	2,109	439	3	28	22	41	29	27	-	9	33		29	3	111	104
KS	1,446	126	11	21	5	20	27	45	-	14	11	2	21	-	118	29
NM	1,037	324	11	5	48	52	48	1	-	-	1	-	41	4	64	49
OK N	761	188	4	25	3	7	30	4		-	-	-	6	2	84	14
OK E	421	181	3	7	5	2	11	8	-	3			4	-	132	6
OK W	1,093	281	9	12	24	21	15					3	2	1	149	45
UT	1,241	235	9	11	14	24	36	1		3			16	5	54	60
WY	314	107	1	3	3	3	69					-	7	-	4	27
11TH	27,765	4,349	142	515	169	212	721	173	3	25	22	18	221	27	1,590	502
AL N	3,675	495	6	2	15	26	52	16				-	24	3	333	18
AL M	1,056	173	2	-	4	13	39	4		-	-	-	21	-	69	10
AL S	748	147	5	6	4	6	43	3	-	-			8		69	3
FL N	1,342	369	16	1	12	27	100	28	-	-	6	1	23	2	143	10
FL M	11,880	1,217	23	83	80	38	182	74	-	15	12	6	44	6	520	191
FL S	4,501	1,124	54	417	33	36	156	21	2	2	1	3	32	8	155	204
GA N	2,516	477	30	3	17	49	91	22	1	7	3	7	33	7	126	78
GA M	1,183	223	3	1	8	9	34	3	-	-	-	-	16	1	125	20
GA S	833	123	3	2	10	8	22	2	-	1	-	1	16	1	39	12

RA24

Table C-3A. (September 30, 2007—Continued)

Circuit and District	Total Private Civil Cases	Private Cases								Prisoner Petitions						
		Contract	Real Property	FELA*	Marine Personal Injury	Motor Vehicle Personal Injury	Other Personal Injury	Other Tort Actions	Civil Rights	Habeas Corpus General	Death Penalty	Conditions and Civil Rights	Mandamus and Other	Copyright, Patent, Trademark	Labor Suits	All Other
9TH	32,770	3,586	216	56	226	242	3,140	687	4,825	6,545	281	4,624	127	2,361	1,957	3,698
AK	244	66	3	-	10	4	28	5	48	24	-	11	-	3	15	27
AZ	2,371	370	19	3	1	42	120	39	488	357	48	459	7	134	91	192
CA N	7,417	538	28	4	29	14	1,900	254	747	966	40	627	5	540	483	1,246
CA E	5,488	251	36	12	2	26	115	34	647	1,921	46	1,981	9	87	141	197
CA C	7,629	825	33	8	16	27	337	173	1,041	2,044	90	459	1	1,232	644	602
CA S	1,652	222	11	-	17	5	64	42	253	126	7	162	5	182	93	393
HI	507	114	9	-	26	1	50	8	178	4	-	26	-	16	31	46
ID	199	87	8	-	-	10	36	9	85	52	11	130	2	11	28	40
MT	443	137	14	3		24	51	10	52	35	-	69	-	4	22	42
NV	2,449	469	18	2	4	30	149	43	472	376	31	259	14	171	155	216
OR	1,770	208	14	4	12	32	84	36	428	434	6	131	83	87	91	120
WA E	366	55	11	8	-	7	23	4	84	33	1	69	1	7	21	53
WA W	1,647	265	16	12	108	13	175	29	282	109	1	291	-	98	134	207
GUAM	27	8	1	-	1	2	2	1	4			1				7
NMI	43	8	-	-		2	6		17	-	-	-	-	1	8	1
10TH	6,898	1,181	91	39	4	285	622	106	1,878	691	34	738	8	328	326	736
CO	1,662	365	21	12	3	38	113	19	361	145	-	221	-	101	77	186
KS	1,120	168	5	12		36	95	28	280	50	-	134	2	34	89	187
NM	1,278	171	26	6	-	55	141	14	537	78	-	95	-	27	42	86
OK N	571	98	7	4	-	8	37	7	150	117	14	18	2	11	48	43
OK E	240	19	4	3	1	10	15	2	58	62	3	48	2	2	6	6
OK W	812	131	6			21	71	14	241	81	14	103	2	25	28	75
UT	1,036	204	14	2	-	14	110	19	205	30	2	98		127	52	120
WY	207	35	8	-	-	21	40	3	37	19	1	21	-	1	7	11
11TH	23,428	2,381	150	9	182	318	7,476	280	3,106	1,842	131	1,762	32	689	3,731	1,312
AL N	3,180	209	20	4	2	64	107	30	519	144	26	180	-	24	1,731	120
AL M	985	108	4	-	-	34	70	13	249	85	8	208	7	7	36	55
AL S	601	121	10	-	13	17	23	39	90	30	8	121	-	13	23	33
FL N	873	125	5	-	-	12	47	6	205	230	11	225	4	27	43	34
FL M	10,983	538	17	1	31	47	6,808	55	870	889	57	266	5	201	929	365
FL S	3,177	641	23	-	108	26	254	50	426	204	4	235	6	219	788	410
GA N	2,344	397	46	2	1	67	272	67	639	189	7	131	6	101	139	220
GA M	893	97	8	1	2	33	89	11	215	102	3	244	-	17	45	46
GA S	512	90	3	1	5	18	27	14	93	49	1	181	2	5	10	25

*FELA FEDERAL EMPLOYERS LIABILITY ACT

THOMSON REUTERS

Search Criteria

Court:
U.S. District Courts > District of Columbia - Federal Courts
Date Range: 01/2009 to 06/2009

Litigation Refinements
Practice Area:
Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
... > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	13	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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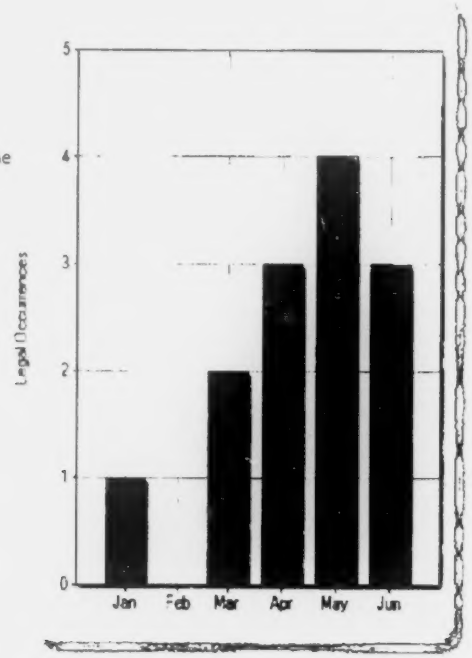

Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts	Occurrences	%	Courts Trend
U.S. District Courts > District of Columbia - Federal Courts	13	100.0%	

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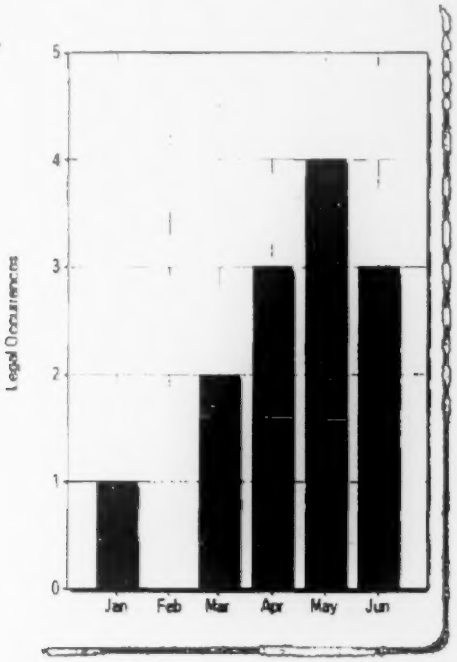


RA29

THOMSON REUTERS

Search Criteria

Court:

U.S. District Courts > Maine - Federal Courts
U.S. District Courts > Massachusetts - Federal Courts
U.S. District Courts > New Hampshire - Federal Courts
U.S. District Courts > Puerto Rico - Federal Courts
U.S. District Courts > Rhode Island - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

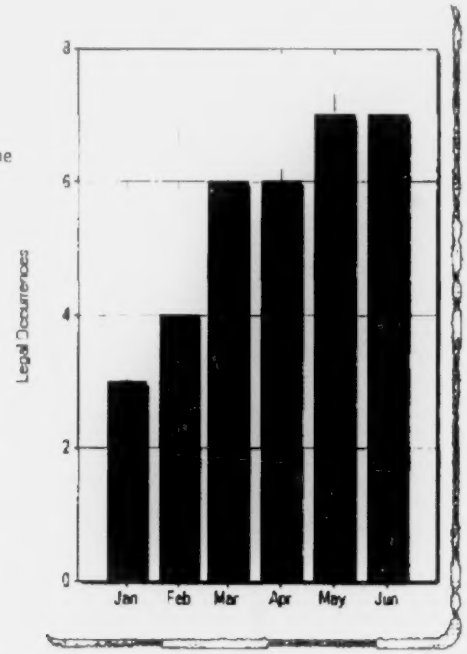
Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
... > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	33	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

View Report Online



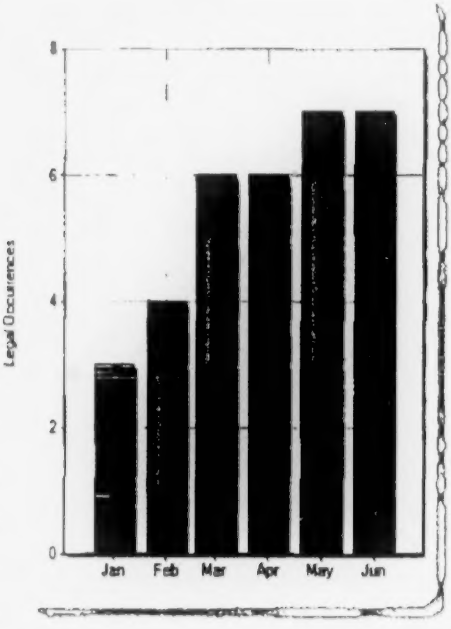
Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts - Massachusetts - Federal Courts	19	57.6%
[illegible]	7	21.2%
U.S. District Courts - Maine - Federal Courts	4	12.1%
[illegible]	2	6.1%
U.S. District Courts - New Hampshire - Federal Courts	1	3.0%

Courts Trend



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RA33

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Search Criteria

Court:

U.S. District Courts > Connecticut - Federal Courts
U.S. District Courts > New York - Federal Courts
U.S. District Courts > Vermont - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
.. > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	359	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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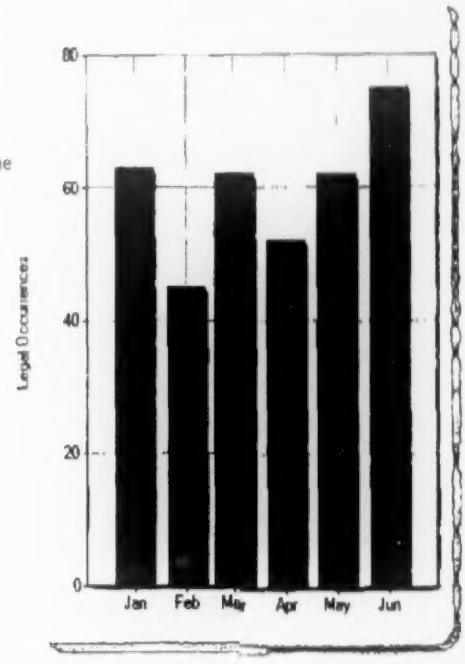

Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts - New York - Federal Courts	344	95.8%
[illegible]	14	3.9%
U.S. District Courts - Vermont - Federal Courts	1	0.3%

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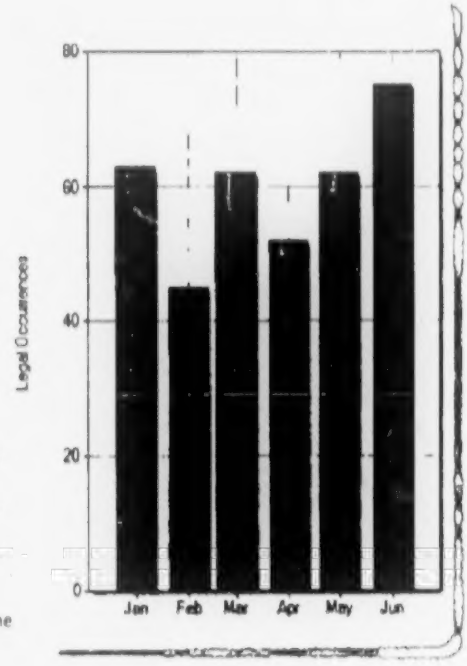
Courts Trend



Search Criteria

Court:

U.S. District Courts > Delaware - Federal Courts
U.S. District Courts > New Jersey - Federal Courts
U.S. District Courts > Pennsylvania - Federal Courts
U.S. District Courts > Virgin Islands - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
... > Fair Labor Standards Act > Federal NCS: Labor: Fair Labor Standards Act (710)	167	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NCS: Labor: Fair Labor Standards Act (710)

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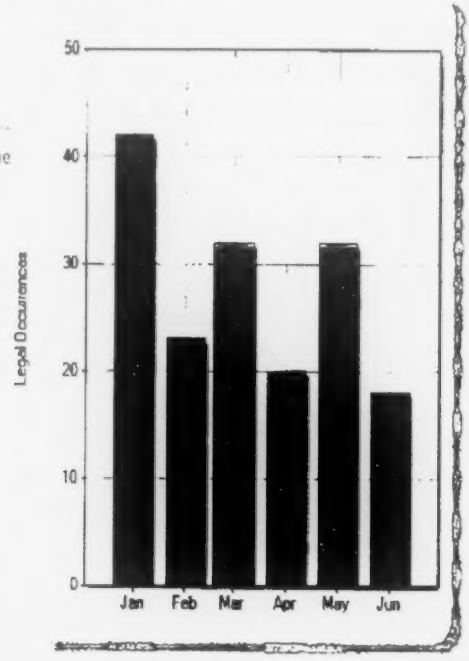

Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts > Pennsylvania - Federal Courts	103	61.7%
[illegible]	56	33.5%
U.S. District Courts > Delaware - Federal Courts	8	4.8%

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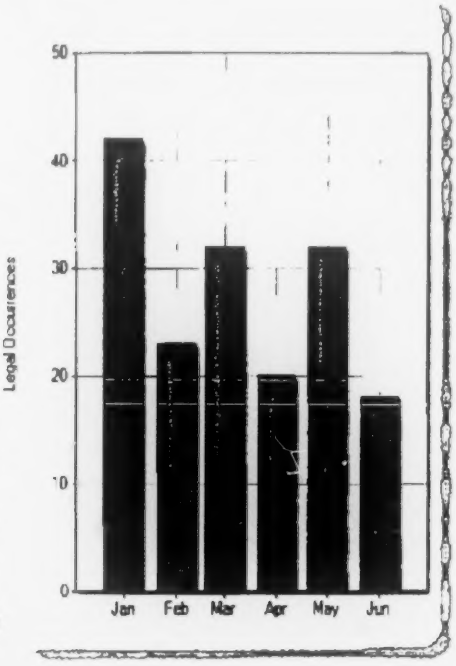
Courts Trend



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FLSA 4th Circuit - 2009 Litigation Report

THOMSON REUTERS

Search Criteria

Court:

U.S. District Courts > Maryland - Federal Courts
U.S. District Courts > North Carolina - Federal Courts
U.S. District Courts > South Carolina - Federal Courts
U.S. District Courts > Virginia - Federal Courts
U.S. District Courts > West Virginia - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
> Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	154	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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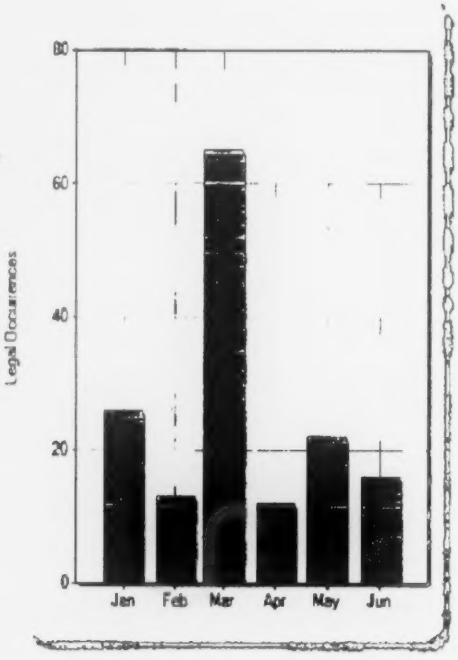
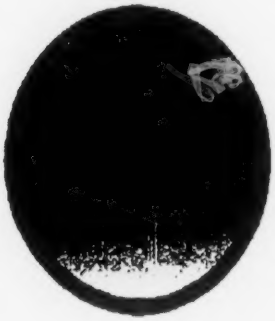


Litigation: Court Trends & Analysis

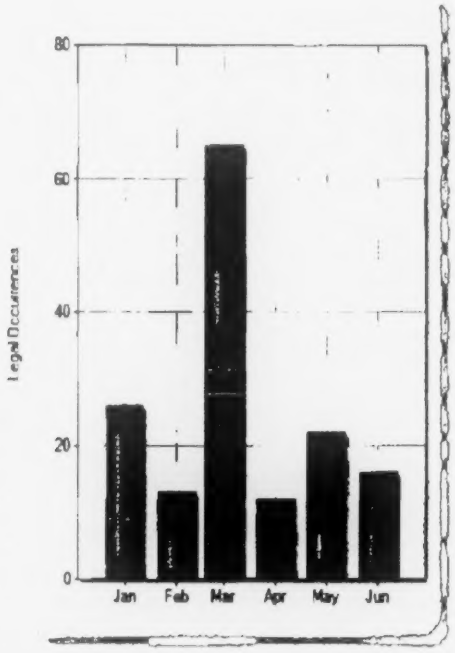
The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution



Courts	Occurrences	%
U.S. District Courts - North Carolina - Federal Courts	49	31.8%
[illegible]	47	30.5%
U.S. District Courts - Maryland - Federal Courts	31	20.1%
[illegible]	14	9.1%
U.S. District Courts - West Virginia - Federal Courts	13	8.4%

Courts Trend



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FLSA 5th Circuit - 2009 Litigation Report

THOMSON REUTERS

Search Criteria

Court:

U.S. District Courts > Louisiana - Federal Courts
U.S. District Courts > Mississippi - Federal Courts
U.S. District Courts > Texas - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
...> Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	357	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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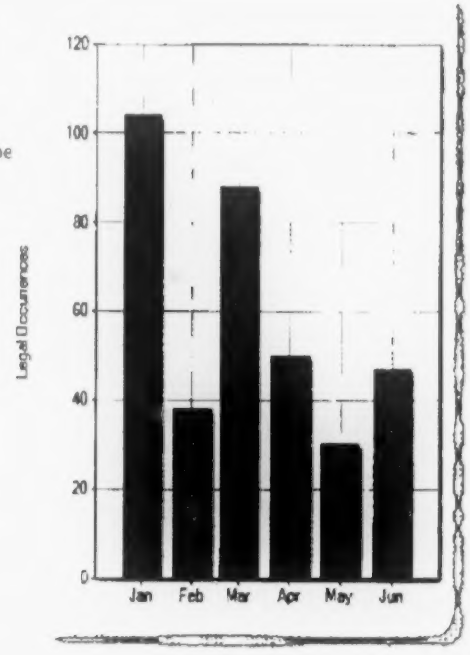

Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts > Texas - Federal Courts	279	78.2%
U.S. District Courts > Mississippi - Federal Courts	64	17.9%
U.S. District Courts > Louisiana - Federal Courts	14	3.9%

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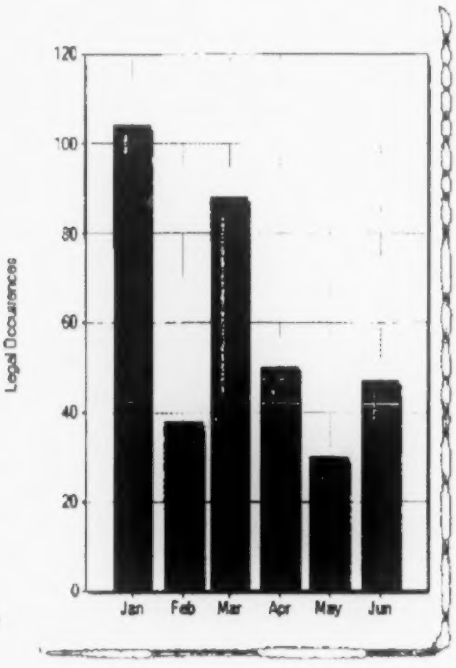
Courts Trend



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Search Criteria

Court:
U.S. District Courts > Kentucky - Federal Courts
U.S. District Courts > Michigan - Federal Courts
U.S. District Courts > Ohio - Federal Courts
U.S. District Courts > Tennessee - Federal Courts
Date Range: 01/2009 to 06/2009

Litigation Refinements
Practice Area:
Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
... > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	149	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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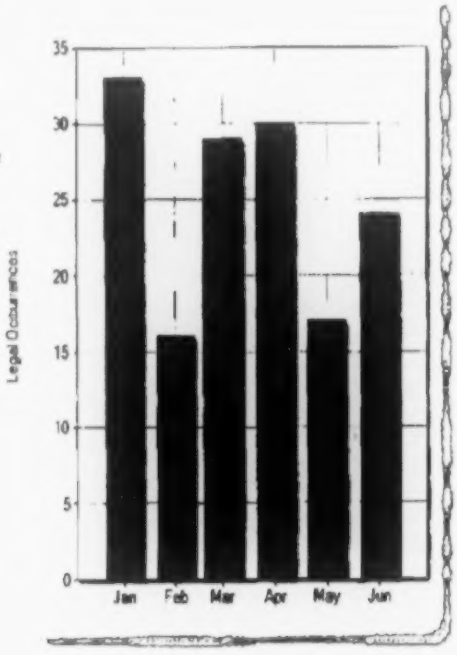

Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts > Tennessee > Federal Courts	74	49.7%
[illegible]	47	31.5%
U.S. District Courts > Michigan > Federal Courts	25	16.8%
[illegible]	3	2.0%

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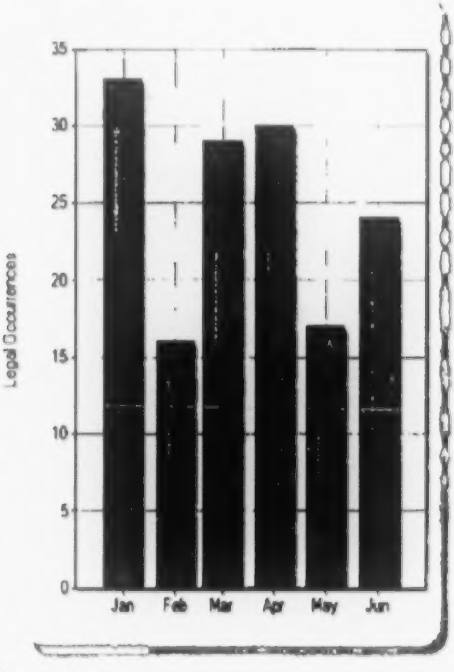
Courts Trend



Search Criteria

Court:

U.S. District Courts > Illinois - Federal Court
U.S. District Courts > Indiana - Federal Courts
U.S. District Courts > Wisconsin - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
.. > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	179	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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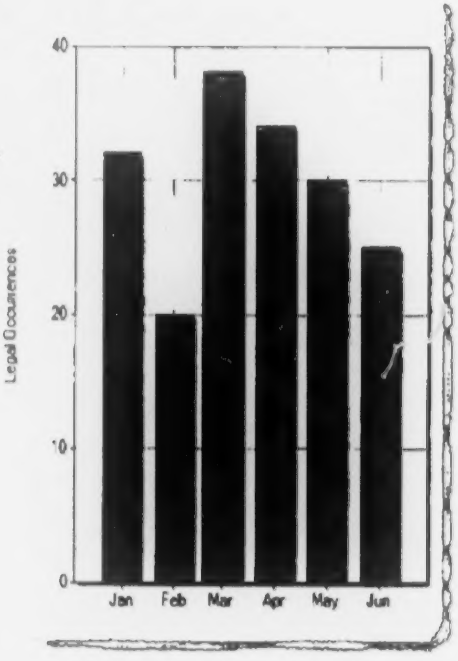

Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts > Illinois - Federal Court	124	69.3%
[illegible]	36	20.1%
U.S. District Courts > Wisconsin - Federal Courts	19	10.6%

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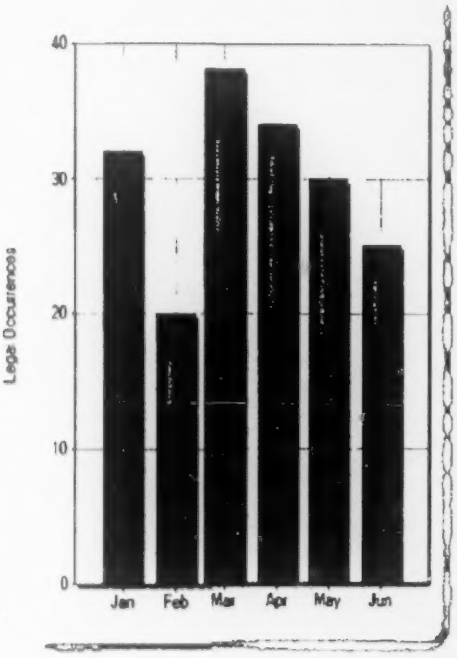
Courts Trend



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Search Criteria

Court:

U.S. District Courts > Arkansas - Federal Courts
U.S. District Courts > Iowa - Federal Courts
U.S. District Courts > Minnesota - Federal Courts
U.S. District Courts > Missouri - Federal Courts
U.S. District Courts > Nebraska - Federal Courts
U.S. District Courts > North Dakota - Federal Courts
U.S. District Courts > South Dakota - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
... > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	76	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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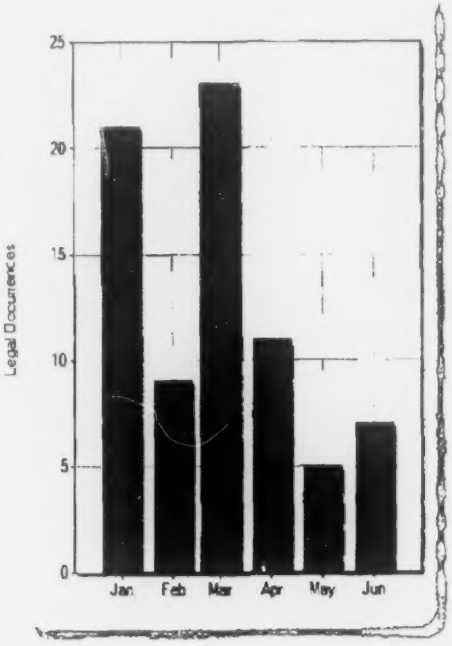
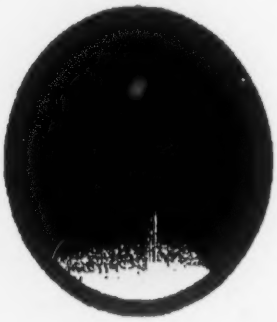


Litigation: Court Trends & Analysis

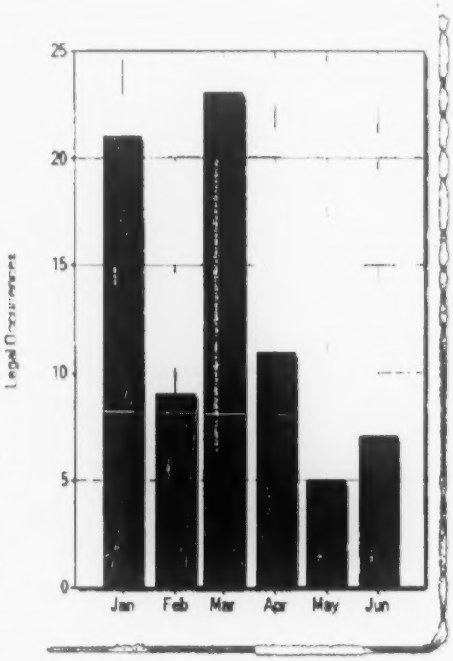
The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution



Courts	Occurrences	%
U.S. District Courts > Missouri - Federal Courts	30	39.5%
U.S. District Courts > Arkansas - Federal Courts	20	26.3%
U.S. District Courts > Iowa - Federal Courts	10	13.2%
[illegible]	10	13.2%
U.S. District Courts > Nebraska - Federal Courts	4	5.3%
[illegible]	2	2.6%

Courts Trend



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Search Criteria

Court:

U.S. District Courts > Alaska - Federal Courts
U.S. District Courts > Arizona - Federal Courts
U.S. District Courts > California - Federal Courts
U.S. District Courts > Guam - Federal Courts
U.S. District Courts > Hawaii - Federal Courts
U.S. District Courts > Idaho - Federal Courts
U.S. District Courts > Montana - Federal Courts
U.S. District Courts > N. Mariana Islands - Federal Courts
U.S. District Courts > Nevada - Federal Courts
U.S. District Courts > Oregon - Federal Courts
U.S. District Courts > Washington - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

Litigation: Practice Area Trends & Analysis

The Practice Area Trends & Analysis section uses West's KeySearch topics to analyze litigation activity by practice area. The practice area of an opinion is based on the topics that occur most frequently in the text of the opinion and the West headnotes. Litigation events are analyzed by the overall share of events pertaining to a particular practice area and the number of events per year for each practice area during the selected date range.

Practice Area	Occurrences	%	Practice Area Trend
... > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	243	100.0%	

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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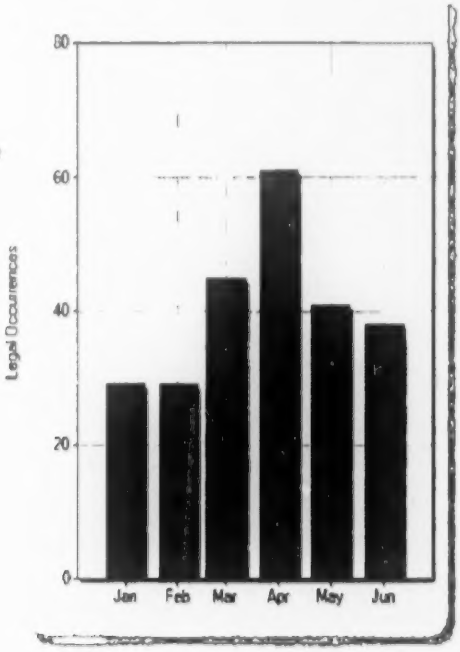


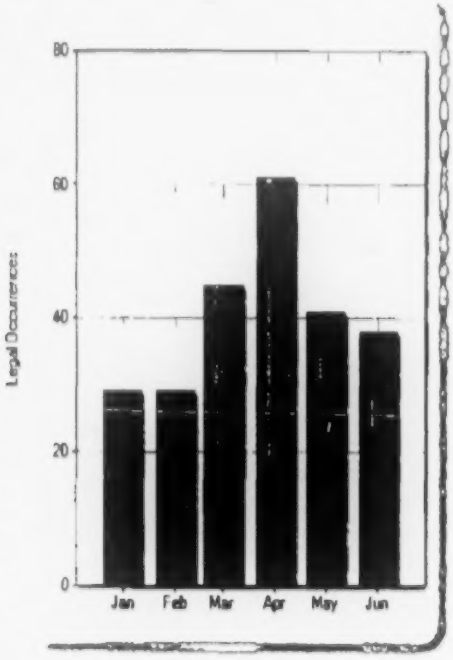
Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts - California - Federal Courts	143	59.8%
U.S. District Courts - [illegible] - Federal Courts	41	16.9%
U.S. District Courts - Nevada - Federal Courts	14	5.8%
U.S. District Courts - [illegible] - Federal Courts	14	5.8%
U.S. District Courts - Idaho - Federal Courts	9	3.7%
U.S. District Courts - [illegible] - Federal Courts	9	3.7%
U.S. District Courts - N. Mariana Islands - Federal Courts	6	2.5%
U.S. District Courts - [illegible] - Federal Courts	5	2.1%
U.S. District Courts - Alaska - Federal Courts	2	0.8%

Courts Trend



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U.S. District Courts > New Mexico - Federal Courts
U.S. District Courts > Oklahoma - Federal Courts
U.S. District Courts > Utah - Federal Courts
U.S. District Courts > Wyoming - Federal Courts

Date Range: 01/2009 to 06/2009

Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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Practice Area	Occurrences	%
...> Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	119	100.0%

Employment/Labor ... Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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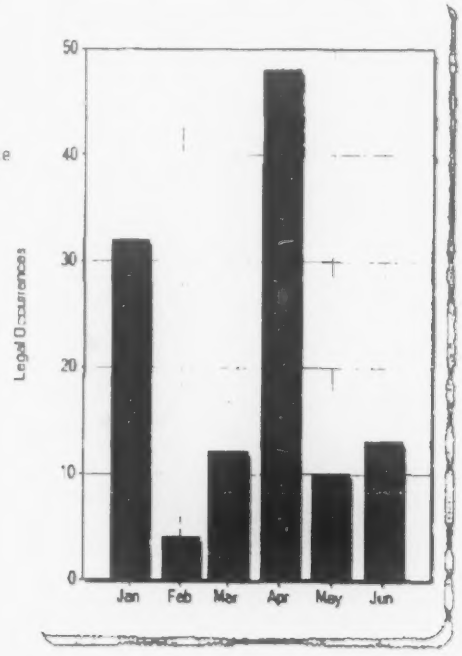
Practice Area Trend



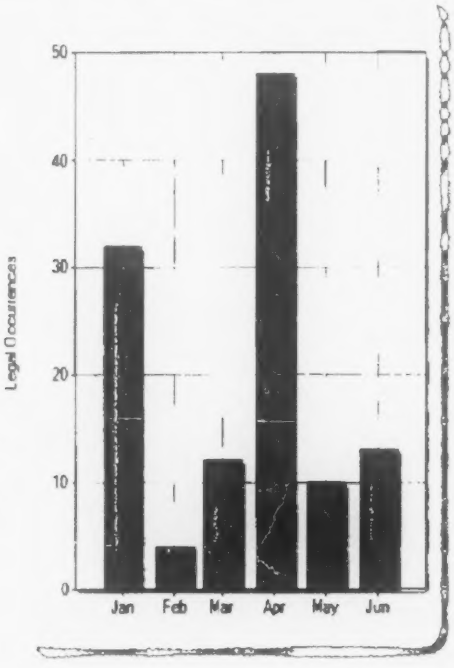
Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts - Kansas Federal Courts	53	44.5%
[illegible]	42	35.3%
U.S. District Courts - Colorado Federal Courts	15	12.6%
[illegible]	5	4.2%
U.S. District Courts - Utah Federal Courts	3	2.5%
[illegible]	1	0.8%

Courts Trend



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Litigation Refinements

Practice Area:

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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Litigation: Practice Area Trends & Analysis

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Practice Area	Occurrences	%
.. > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)	1214	100.0%

Employment/Labor > Fair Labor Standards Act > Federal NOS: Labor: Fair Labor Standards Act (710)

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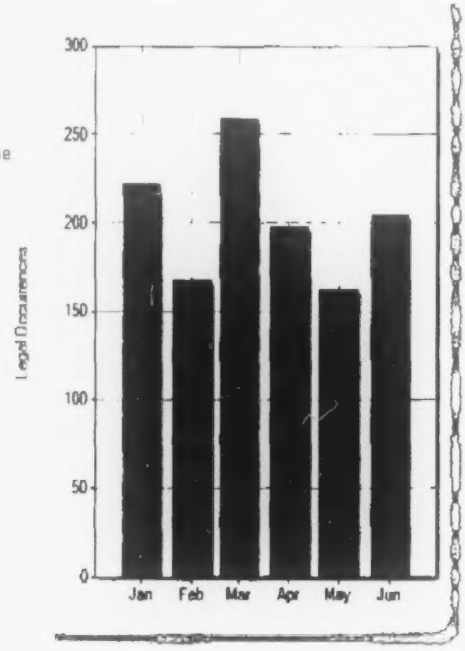
Practice Area Trend



Litigation: Court Trends & Analysis

The Court Trends & Analysis displays the state and federal courts in which matters pertaining to the practice area were litigated during the selected date range. Litigation events are analyzed by the overall share of events litigated in a particular jurisdiction.

Courts Distribution

Courts	Occurrences	%
U.S. District Courts - Florida - Federal Courts	1059	87.2%
[illegible]	93	7.7%
U.S. District Courts - Alabama - Federal Courts	62	5.1%

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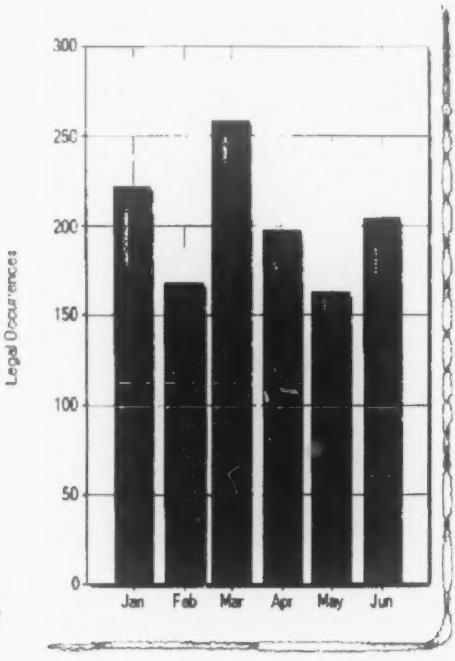
Courts Trend



AMICUS CURIAE BRIEF

MOTION FILED

APR 29 2009

No. 08-1287

IN THE

Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States of America (the "Chamber") moves for leave to file a brief *amicus curiae* in support of the Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals in *Family Dollar Stores, Inc. v. Morgan*, 08-1822. A copy of the proposed brief *amicus curiae* accompanies this Motion. The Chamber files this Motion because counsel for Respondents have refused to consent to the filing of this brief.

1. The Chamber is the largest federation of businesses and associations in the world. It represents an underlying membership of nearly 3,000,000 businesses and organizations of every size, in every region of the country. An important function of the Chamber is to give voice to the interests and concerns of American business on important matters before the courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber has advanced those interests, *inter alia*, by filing briefs in more than 1,000 cases of importance to the business community. Those cases include one employment law case pending before the Court, *Gross v. FBL Financial Services, Inc.*, 08-441 (*certiorari* granted Dec. 5, 2008), as well as other cases dealing with various aspects of federal employment law. *See, e.g., Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (U.S. 2008); *Federal Exp. Corp. v. Holowecki*, 128 S. Ct. 1147 (U.S. 2008); *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618 (2007).

2. Chamber members are currently facing an unprecedented increase in the number of "collective action" cases under the Fair Labor Standards Act. FLSA collective action filings now outnumber discrimination class actions filed under other federal employment laws such as Title VII.

3. Among the most troublesome aspects of this new wave of litigation is the almost total absence of meaningful standards for district courts to use in determining whether such cases can proceed to trial as collective actions. That decision is typically made by district judges under what has appropriately been called the "ad hoc" approach, which offers no fixed, reliable criteria for determining whether the individuals in the putative plaintiff group are sufficiently homogeneous to qualify as "similarly situated," the relevant statutory language. Under this approach, the results in a given case depend in large measure on the judge before whom the case is pending. Because employers value predictability and stability in the law, it is intolerable for the outcome of such important questions to depend upon the courtroom in which the motion is heard. That state of affairs, however, is likely to persist absent guidance from this Court.

4. The court of appeals in this case adopted an approach for collective action certifications that will make it all but impossible for businesses to obtain a fair hearing on the merits of most FLSA collective action cases. That approach will also materially escalate the costs and risks associated with defending those cases and, accordingly, will increase the nearly inexorable pressure on defendants to settle these cases, even when valid defenses exist.

5. For Chamber members with national operations or that do business within the Eleventh Circuit, the opinion below may establish a *de facto* nationwide standard. Because the decision would permit a plaintiff to obtain collective action status simply by proving that the employees at issue shares some job-related characteristics, plaintiffs lawyers will almost certainly choose district courts in the Eleventh Circuit for such cases in the future whenever possible, burdening those courts and delaying access to the courts by litigants with disputes of other sorts.

The Chamber submits that the views of the business community on these important issues will be helpful to the Court in determining whether to grant the Petition. Accordingly, the Chamber respectfully moves the Court to grant this Motion and allow the filing of the accompanying brief.

Respectfully submitted,

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INTEREST OF THE *AMICUS*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the voice of American business. It is the largest federation of businesses and associations in the world, representing an underlying membership of nearly 3,000,000 businesses and organizations of every size, in every region of the country. As explained at greater length in the accompanying Motion for Leave to File Brief *Amicus Curiae*, Chamber members are currently facing an explosion of "collective action" suits under the Fair Labor Standards Act. These cases pose particular concern for Chamber members because there currently is no meaningful set of standards for district courts to apply in determining whether to permit such cases to proceed in the collective action format. For the reasons provided below, the Chamber joins the numerous district courts that have decried this lack of guidance, and it urges the Court to grant review.

---

1. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. The Petitioner has consented to the filing of this brief. Respondents have not. A monetary contribution intended to fund the preparation of this brief in part was made by Dollar Tree Stores, Inc., which is involved in similar litigation currently pending in the United States District Court for the Northern District of Alabama.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 70 years, the lower federal courts have had a single two-word phrase — "similarly situated" — to help them determine whether plaintiffs are entitled to pursue the peculiar form of mass litigation available under Section 216(b) of the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 216(b). This Court has never considered the meaning of that phrase. Until the decision below, the courts of appeals had not meaningfully considered the phrase either due to the unique opt-in-only structure of those "collective action" cases, the unavailability of interlocutory appeals, and the "hydraulic pressure"[2] that group litigation exerts on defendants to settle. *See* discussion, *infra*, pp. 8-10.

The absence of meaningful appellate guidance on this critical question is a recurrent problem for district courts. FLSA collective action filings in the federal courts are now more numerous than any other type of collective or class action.[3] These collective action filings now *far* outnumber discrimination class actions under Title VII.[4] Thus, it is no wonder that district judges

2. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) ("class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability").

3. *See* Emery G. Lee, et al., *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, Federal Judicial Center 3-4 (Apr. 2008) ("Federal Judicial Center Report").

4. *See* Nancy Montwieler, *Wage-Hour Class Actions Surpassed EEO In Federal Courts Last Year, Survey Shows*, 56 DAILY LAB. REP., at C-1, Mar. 22, 2002.

throughout the country regularly lament the lack of assistance they have received on how to handle this opaque statutory standard:

> Section 216(b) does not define "similarly situated," and neither the United States Supreme Court nor the [courts of appeals] have offered [district courts] guidance as to how [they] should determine whether the representative plaintiffs are "similarly situated" to the putative plaintiffs.

Pagliolo v. Guidant Corp., No. Civ. 06-943, 2007 WL 2892400, at *1 (D. Minn. Sept. 28, 2007). The court in *Pagliolo* was complaining specifically about the absence of Eighth Circuit precedent, but identical complaints appear in reported decisions from every Circuit — and nearly every judicial district in the country.[5] *See* discussion, *infra*, on p. 7, and n.12. In the absence of controlling guidance, the phrase "similarly situated" has become a Rorschach test for every district judge who encounters it, with the fate of each collective action certification motion turning not simply upon the circuit in which the case arises, but upon the district judge who hears it.

Although there is little or no authority on the meaning of "similarly situated" in the FLSA context,

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5. One day after this case was docketed, Respondents waived their right to file an answering brief, dramatically shortening the time available for the preparation of this brief. Accordingly, *amicus* was unable to perform the district-by-district analysis that would have been necessary to confirm the statement in the text.

the phrase is a common one in other employment law cases. In discrimination and retaliation cases, every circuit has previously held, in form or substance, that "[i]n order for . . . employees to be considered similarly-situated . . . all of the relevant aspects of [the compared employees'] employment situation [must be] nearly identical."[6] The court below, however, concluded that all 1,424 of the plaintiffs in this action were similarly situated simply because they "shared a number of factual details with respect to their job duties and day-to-day work [and] share[d] common job traits." *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1263 (11th Cir. 2008).

After concluding that a few "common job traits" were sufficient to justify collective action status, the court affirmed a trial plan by which Petitioner was held liable to all 1,424 of the plaintiffs on the basis of testimony from just seven individuals handpicked by Plaintiffs' counsel. This schematic cannot be reconciled with even the most basic notions of fairness or the FLSA's underlying exemption standards. The applicable FLSA substantive liability standard requires the finder of fact to consider a long list of individualized factors,[7] decide the relative importance of each "on a case-by-case basis,"[8] largely without regard to job titles or descriptions, and to render a decision based on the facts

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6. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994). *See also* cases collected, *infra*, at p. 17 n.20.

7. 29 C.F.R. § 541.102.

8. *Id.* § 541.106(a).

of each "particular case."[9] A trial decided on the basis of the testimony of a handful of individuals (.005% of the "class") who need only share "a number of factual details" cannot accomplish this fact-intensive task.

This case represents a rare — indeed, unique — opportunity for the Court to correct the Eleventh Circuit's error and fill the void that has bedeviled so many district judges across the country. It is the only FLSA case in which the meaning of the "similarly situated" standard has ever been squarely presented to this Court.[10] This is true even though cases in which the phrase arises are commonplace and are consuming

---

9. *Id.* § 541.700(a).

10. In *Anderson v. Cagle's Inc.*, 488 F.3d 945, 952-55 (11th Cir. 2007), *cert denied*, 128 S.Ct. 2902 (2008), the petition presented an unrelated question regarding "donning and doffing" claims under 29 U.S.C. § 203(o). The court of appeals decision in *Anderson* is the only other appellate opinion to consider the certification standard in an FLSA collective action, although it too failed to define the standard in any discernible sense. Five appellate decisions have considered certification standards in collective actions under the Age Discrimination in Employment Act which relies upon the same "similarly situated" language. *See Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001), *cert. denied*, 536 U.S. 934 (2002); *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001), *cert. denied*, 534 U.S. 1127 (2002); *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996), *cert. denied*, 519 U.S. 987 (1996); *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207 (5th Cir. 1995); *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43 (3d Cir. 1989). These decisions offer little if any guidance about the phrase "similarly situated" even in the context of age discrimination litigation, and nothing at all to illuminate the phrase's application in the context of FLSA cases like this one.

an ever greater share of the nation's judicial resources. District courts now regularly receive appellate guidance on the application of Fed. R. Civ. P. 23, and opportunities regularly present themselves to the Court for it to consider open questions in that arena if it chooses, but under the FLSA, there is no "next case" waiting in the wings for the Court to select. The Court should grant the writ.

REASONS FOR GRANTING THE PETITION

I. Collective Actions Now Dwarf Other Kinds Of Mass Litigation, And The Lower Courts Are Expressly, Repeatedly Lamenting The Lack Of Appellate Guidance On The Question Presented

There is no inter-circuit conflict in this case. That is not, however, because the issue presented is unimportant or because it arises infrequently. Indeed, it almost certainly is among the most important questions confronting district judges today that has evaded any meaningful appellate review. The construction of the phrase "similarly situated" arises in every FLSA collective action, and actions of that type are now *the most common* class action-type lawsuit filed in the federal courts, dwarfing all other types of class actions except perhaps those under consumer protection laws.[11] *See* Federal Judicial Center Report, at 3. The Federal Judicial Center Report characterized the rising tide of FLSA collective action filings as "striking," noting

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11. This understates the regularity with which district courts are confronted with this language because the data include neither cases under the ADEA nor the Equal Pay Act.

that filings of this sort had increased in "absolute numbers . . . from 337 in the first six-month period studied to 1,104 in the last six-month period — a 228 percent increase." *Id.* at 3-4.

Neither can the absence of an inter-circuit conflict be taken as evidence that the applicable law is well-understood. In nearly 100 reported decisions, district judges have lamented the lack of appellate guidance on this critical question.[12] The judges in each such case have observed, in roughly comparable language, that the "FLSA does not define the term 'similarly situated' and neither the United States Supreme Court nor the [applicable court of appeals has] provide[d] direct guidance on determining whether potential class members are similarly situated." *Bishop v. AT & T Corp.*, ___ F.R.D. ___, No. 08-CV-468, 2009 WL 763946, at *2 (W.D. Pa. Mar. 23, 2009). These are just a few examples from the first three months of this year: *Wilson v. Guardian Angel Nursing, Inc.*, No. 3:07-0069, 2009 WL 790107, at *5 (M.D. Tenn. Mar. 24, 2009) ("As many courts have noted, 'similarly situated' has not been strictly defined by either Congress or the federal judiciary."); *Howard v. Securitas Security Servs., USA Inc.*, No. 8-CV-2746, 2009 WL 140126, at *1 (N.D. Ill. Jan. 20, 2009) ("neither the FLSA nor its implementing regulations define or provide guidance on the meaning of the term 'similarly situated [and] the Seventh Circuit has yet to provide guidance"); *Davis v. Westgate Planet Hollywood Las Vegas, LLC*, No. 208-CV-00722, 2009 WL

12. This number is likely a significant understatement given the restrictive search methodology *amicus* used. The appendix to this brief lists 87 cases containing similar language.

102735, at *9 (D. Nev. Jan. 12, 2009) ("The FLSA does not define the term 'similarly situated,' and the Ninth Circuit has not yet formulated a test for courts to determine whether putative class members are 'similarly situated.'").

There are no circuit opinions defining a usable standard for "similarly situated," but the reasons are entirely unrelated to the prevalence of the issue or its importance to the district courts. First, the courts of appeals have thus far concluded that no interlocutory "collateral order" review is possible from a "similarly situated" decision.[13] Review of a class decision in an FLSA case, then, must await final judgment. In the traditional class action context, Fed. R. Civ. P. 23(f) was added to the Federal Civil Rules, in part, precisely because the lack of interlocutory review had left many fundamental aspects of Rule 23 "poorly developed." *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 835 (7th Cir. 1999). The same is true with respect to FLSA cases but Rule 23(f) provides no relief.

Second, when a court denies collective action status to a plaintiff group, the easiest recourse for the plaintiffs is often to file another action rather than to appeal. The FLSA's opt-in-only design makes it unusually easy for plaintiffs' lawyers to judge-and-forum shop by filing

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13. *See McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1141 (9th Cir. 2007); *Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 546-49 (6th Cir. 2006); *Baldridge v. SBC Communications, Inc.*, 404 F.3d 930, 931-33 (5th Cir. 2005); *Lusardi v. Lechner*, 855 F.2d 1062, 1065 (3d Cir. 1988). In *amicus'* view, these decisions give the collateral order doctrine an unnecessarily cramped reading.

multiple actions against the same employer in different courts, searching for a single case in which the court will authorize a collective action. That is precisely what happened in this case. Counsel for Respondents here filed a number of different actions, in different districts, all seeking collective action status representing the same group of Family Dollar store managers, asserting the same FLSA claims. Collective action status was denied in several,[14] but in this case counsel obtained collective action status and the largest jury verdict in Alabama in 2006. 16 ALA. L. WEEKLY NO. 6 (Feb. 9, 2007).

Because an individual is not bound by the results in an FLSA case unless he or she has affirmatively opted-in, plaintiffs' lawyers can file new cases *seriatim* until they get the answer they want; when certification is granted, the plaintiffs in any other identical actions simply file opt-in consents in the "successful" action. Plaintiffs and their counsel, then, have no incentive to pursue an appeal from an adverse collective action decision, as it is simpler and cheaper to find a new judge and file a new case. The idiosyncratic procedures and undefined standards applicable to FLSA collective actions and the unique opportunities they present for judge-and-forum shopping have combined to generate vast wealth for the plaintiffs' bar, but have generated only uncertainty for the courts and escalating costs for employers. *See* Michael Orey, *Wage Wars*, Business Week (Oct. 1, 2007), *available at http://www.businessweek.com/magazine/content/07_40/b4052001.htm* (profiling one FLSA attorney who has

14. *See Ward v. Family Dollar Stores, Inc.*, No. 3:06-CV-441, 2008 WL 199699 (W.D.N.C. Jan. 22, 2008); *Grace v. Family Dollar Stores, Inc.*, No. 3:06-CV-306, 2007 WL 2669699 (W.D.N.C. Sept. 6, 2007).

accumulated more than $458 million in settlements within a short time, at least 25% attributable to attorneys' fees.).

Finally, employers are rarely in a position to appeal because they are rarely willing or able to see such litigation through to a final judgment. For employers, the prospect of trial in a collective action case is chilling. With no settled protocol for trying these cases, and with the potentially enormous exposure, settlement is often the most prudent course (even where compelling defenses are available). This, too, was an animating rationale behind Rule 23(f). *See* Fed. R. Civ. P. 23(f), Adv. Comm. Notes (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability.").

Members of this Court have previously observed that some lower court confusion over important legal questions can be tolerated for a time while various perspectives on the question develop in the lower courts, permitting the question to "mature" before ultimately reaching this Court for consideration. *See, e.g., McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting the denial of certiorari); *see also Gressman, Geller, et al., Supreme Court Practice* 246 (9th ed. 2007). Judicial thinking on the present question is not "maturing" or becoming more focused. After more than 70 years of litigation, the persisting lack of guidance on the question is merely becoming more intolerable.

If review is not granted in this case, it seems increasingly unlikely that another opportunity for Supreme Court review will present itself anytime soon.

The Eleventh Circuit's decision below will prove irresistible to the plaintiffs' bar. Given the largely toothless "similarly situated" standard it adopts (discussed immediately below), no employer with operations touching the Eleventh Circuit is likely to be sued anywhere else.

II. The "Similarly Situated" Standard Adopted By The Eleventh Circuit Fails Adequately To Protect The Due Process Rights Of Defendants And The Interests Of Non-Testifying Plaintiffs

Like the commonality, typicality, and predominance requirements of Rule 23, the "similarly situated" standard exists to ensure a degree of homogeneity among the members of the FLSA "class." The critical — and unanswered — questions posed by this cryptic two-word phrase, then, are: what factors must be similar and how similar must they be.

For cases like this one, in which the dispute centers on the exempt status *vel non* of retail store managers, the Department of Labor ("DOL") has largely answered the first question. DOL has provided a non-exhaustive list of activities that are considered managerial:

> Interviewing, selecting, and training of employees; setting and adjusting (or making material especially meaningful recommendations regarding) their rates of pay and hours worked; directing their work; maintaining their production or sales records for use in supervision or control; appraising their productivity and efficiency for the purpose

> of recommending promotions or other changes in their status; handling their complaints and grievances and disciplining them when necessary; planning their work; determining the techniques to be used; apportioning the work among the workers; determining the type of materials, supplies, machinery or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; and providing for the safety of subordinates and property.

29 C.F.R. § 541.102. "Determination of whether an employee has management as his primary duty *must be based on all the facts in a particular case*," 29 C.F.R. § 541.103 (emphasis added), and an individual may be exempt even if he or she performs only one or a few management duties. *Id.*; *see also Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees*, 69 Fed. Reg. 22,122, 22,122-25 (Apr. 23, 2004) (there are "management" functions other than those included in § 541.102 and a "case-by-case analysis" is necessary to determine whether unlisted functions meet the requirement).[15]

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15. *See also Riley v. Town of Basin*, No. 91-8022, 1992 U.S. App. LEXIS 8621, at *9 (10th Cir. 1992) (Table) (noting that the regulations provide *examples* of what constitutes management); *Murphy v. Town of Natick*, 516 F. Supp. 2d 153, 159 (D. Mass. 2007) (DOL regulations merely provide examples of activities which are "typical management duties"); *Thomas v. Speedway Superamerica, LLC*, No. 04-CV-00147, 2006 WL 4969500, at *9-

(Cont'd)

If all of Family Dollar's store managers indisputably performed all of the listed duties, one would have to consider them "similarly situated." Likewise, if Family Dollar managers *never* performed *any* of these duties, they would almost certainly be "similarly situated."

In the real world, however, and despite the most rigorous employer efforts to *design* jobs to be performed in an exempt way, variations in the duties *actually performed* by retail managers at a large company like Family Dollar occur. This can be because of the size of the store. The manager of a small store with a long-tenured staff and minimal turnover may rarely have to interview or hire, may spend little time training, and may have less need to monitor employee performance. The manager of a large store with serious turnover and

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(Cont'd)

10 (S.D. Ohio Mar. 31, 2006), *aff'd*, 506 F.3d 496 (6th Cir. 2007) (describing the regulation as providing "guidelines" for interpreting what management means); *Beauchamp v. Flex-N-Gate, LLC*, 357 F. Supp. 2d 1010, 1015-16 (E.D. Mich. 2005) (comparing commonalities between an employee's listed responsibilities to the "regulatory examples of 'management' duties"); *see also DOL Wage & Hour Opinion Letter FLSA2009-32*, 2009 WL 649044 (Jan. 16, 2009) (Supervisory Special Agent position fit within "management" exemption where duties included only 6 of the 14 activities listed in the regulation); *DOL Wage & Hour Opinion Letter FLSA2008-4NA*, 2008 WL 1847287 (Feb. 29, 2008) (plant managers satisfy "management" definition where duties include only 7 of the 14 regulatory examples); *Donovan v. Burger King Corp.*, 672 F.2d 221, 226 (1st Cir. 1982) (assistant managers were properly treated as exempt because they supervised other employees even though they had no significant discretion in doing so).

employee discipline problems may spend significant time interviewing, selecting, training, evaluating, and disciplining subordinates. Differences also arise because higher-level managers approach their duties differently. District sales managers may cede to experienced store managers more latitude with respect to hiring and discipline than they will to rookie managers.

Given these variations, and given that "[d]etermination of whether an employee has management as his primary duty *must* be based on all the facts in a particular case," 29 C.F.R. § 541.103 (emphasis added), a finder of fact in the typical case is asked to weigh individually the mix of activities the plaintiff performed. In a collective action, where the exemption status of hundreds, or even thousands, of managers may be at stake, unless all of the managers at issue have performed the same mix of duties, the finder of fact cannot possibly decide the fate of the entire group collectively because it cannot, as the DOL has insisted, make the exemption "determin[ation] on a case-by-case basis." 29 C.F.R. § 541.106(a).

The decision below leaves no room for individualized, nuanced decision-making. The Eleventh Circuit did not require a degree of homogeneity that would have permitted a jury fairly to consider the fate of the entire group. Rather, the court concluded that every one of the 1,424 plaintiffs was "similarly situated" to every other plaintiff simply because they "shared a number of factual details with respect to their job duties and day-to-day work [and] share[d] common job traits." *Morgan*, 551 F.3d at 1263. Because the district court permitted the jury to decide the fate of all 1,424 plaintiffs on the basis

of the testimony of just seven individuals, all of the individual claims were determined by the jury's consideration of those seven individuals.[16]

A brief comparison of the procedure used below and that employed in the more familiar discrimination class action context is illuminating. A pattern or practice discrimination case is usually tried in two phases. During the first phase, the employer's liability to the class as a whole for declaratory and injunctive relief is at stake. If the employer is found liable, the case then proceeds to phase two, where the question becomes whether the

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16. This use of representative testimony was error. *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946) (*superseded in part* by the Portal-to-Portal Act), approved the use of representative evidence in FLSA cases to prove damages when the employer lacks adequate records on the question. Nothing in *Mt. Clemens*, however, suggested that representative evidence could *ever* be used to prove employer liability or to obtain collective action status. Even as to damages, the courts of appeals have imposed substantial restrictions on the use of representative evidence. *Compare Reich v. Southern Md. Hosp., Inc.*, 43 F.3d 949, 952 (4th Cir. 1995) (testimony of 54 employees on behalf of 3,368 plaintiffs in an FLSA collective action was insufficient to support a judgment for all plaintiffs) and *Secretary of Labor v. DeSisto*, 929 F.2d 789, 793 (1st Cir. 1991) (testimony of one employee cannot establish FLSA damages in a case involving 244 employees holding a variety of positions at different locations) *with Donovan v. Williams Oil Co.*, 717 F.2d 503 (10th Cir. 1983) (testimony of 19 station attendants supported an award to 34 employees); *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468 (11th Cir. 1982) (testimony of 23 employees supported an award to 207 employees); *Brennan v. General Motors Acceptance Corp.*, 482 F.2d 825 (5th Cir. 1973) (upholding award where 16 employees testified on behalf of 37 employees).

employer is liable to *individual members of the class* and if so, for how much.[17] The employer is never obligated to pay damages of any sort to any class member unless it is first determined during phase two that the specific claimant at issue had been a victim of the pattern of discrimination found to exist at phase one; simply being a member of the class is not enough.[18]

As the courts below conceived the FLSA collective action, however, there *is* no phase two, and no opportunity for a fact finder to consider "all the facts in [each] particular case." Here, Petitioner was held liable to the entire group of 1,424 based on conclusions reached after hearing about the duties performed by seven individuals presumably handpicked by Respondents' counsel *precisely because* they performed fewer managerial duties than the rest of the group, and performed them less often.[19]

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17. *International Broth. of Teamsters v. United States*, 431 U.S. 324, 361-62 (1977).

18. *Teamsters*, 431 U.S. at 368-71 (finding of liability necessary "with respect to each specific individual at the remedial hearings"). "It is the role of courts to provide relief to claimants, *in individual or class actions*, who have suffered, or will imminently suffer, actual harm." *Lewis v. Casey*, 518 U.S. 343, 349 (1996) (emphasis added). Damages cannot be awarded based "merely [on] the status of being subjected to [an] institution that was not organized or managed properly." *Mayweathers v. Newland*, 258 F.3d 930, 934 (9th Cir. 2001) (quoting *Lewis*, 518 U.S. at 350) (emphasis added); *Bishopp v. District of Columbia*, 57 F.3d 1088, 1092 (D.C. Cir. 1995) (same; "remedial authority is limited to 'actual victims' of discrimination").

19. The court limited each side to 40 hours of trial testimony. *See Morgan*, 551 F.3d at 1278.

This process cannot be reconciled with even the most rudimentary notions of fairness. Had the district court used the standard commonly employed in other types of employment litigation, it would have insisted that "all of the relevant aspects of [the opt-in plaintiffs'] employment situation [be] nearly identical."[20] Employing such a standard would have ensured that the finder of fact could efficiently and fairly decide the fate of all plaintiffs — testifying and non-testifying alike — on the basis of representative testimony, and it would have safeguarded the most fundamental due process protections afforded litigants. Non-testifying plaintiffs would have been assured that their claims were being prosecuted by individuals with interests essentially indistinguishable from theirs. The defendant would not have been held liable to individuals whose claims were materially different from those individuals available to question at trial. *Cf. Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (due process implicated when the "day-

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20. *Pierce*, 40 F.3d at 802. *See also Willis v. Town of Marshall, N.C.*, 275 Fed. Appx. 227, 233 (4th Cir. 2008) (to demonstrate that comparators are "similarly situated" plaintiff's evidence "must show an extremely high degree of similarity" between herself and the comparator(s)) (internal quotations omitted); *Runnels v. Texas Children's Hospital Select Plan*, 167 Fed. Appx. 377, 385 (5th Cir. 2006) (appellants failed to show that they are "similarly situated as to all the factors" to their comparators, and failed to show "nearly identical" circumstances); *Morris v. Family Dollar Stores of Ohio, Inc.*, No. 07-3417, 2009 WL 899894, at *8 (6th Cir. Mar. 21, 2009) (plaintiff's employment situation and that of his comparators must be "nearly identical" to be "similarly situated"); *Rioux v. City of Atlanta, Ga.*, 520 F.3d 1269, 1280 (11th Cir. 2008) (facts related to comparators must "be nearly identical to prevent courts from . . . confusing apples with oranges").

in-court ideal" is infringed); *Hansberry v. Lee*, 311 U.S. 32, 44-45 (1940) (due process is offended when rights of absent parties determined by testimony from those "whose interests are not necessarily or even probably the same as those [by] whom they are deemed to [be] represent[ed]"). No such protections were afforded the litigants here.[21]

III. Because The Eleventh Circuit Rejected Explicit DOL Guidance On The Merits Of The Exemption Question, The Decision Below, If Left Intact, Will Ensure That It Becomes The Circuit Of Choice For All Exemption Cases

As noted above, the feckless standard adopted by the courts below for collective action certification will draw plaintiffs from around the country, limiting further the already remote chances of developing an inter-circuit division of authority on the meaning of the "similarly situated" standard. The Eleventh Circuit will be

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21. The Eleventh Circuit also noted that, because Petitioner had classified its store managers as a group, it was not unfair to have their exempt status determined as a group. In addition to ignoring reality — employers of any size have no alternative but to classify jobs as a group — this idiosyncratic "waiver" analysis is incompatible with orthodox FLSA principles. *See, e.g., Reich v. John Alden Life Ins. Co.*, 126 F.3d 1, 10 (1st Cir. 1997) ("the particular title given to an employee is not determinative"); *Mullins v. City of New York*, 523 F. Supp. 2d 339, 351 (S.D.N.Y. 2007) (quoting 29 C.F.R. § 541.2) ("A job title alone is insufficient to establish the exempt status of an employee"); *Geer v. Challenge Financial Investors Corp.*, No. 05-1109-JTM, 2007 WL 1626494, at *2 (D. Kan. May 30, 2007) (employee's "title alone does not determine whether she meets the executive or managerial exemption to the FLSA").

particularly alluring in cases involving the FLSA's *bona fide* executive exemption because the substantive standard adopted by the Eleventh Circuit rejects (in many instances without mentioning) explicit, relatively recent DOL guidance on point and repudiates years of settled law in order to arrive at a mistakenly cramped construction of that exemption.

The Eleventh Circuit's most adventurous change to FLSA exemption law relates to the weight it placed on the time devoted by Family Dollar store managers to managerial duties. Time and again — no fewer than ten times during the course of its opinion — the court returned to the observation that Petitioner's "store managers spent only 10 to 20% of their time performing exempt work" and 80-90% of their time on non-exempt tasks. *See, e.g., Morgan*, 551 F.3d at 1269.

The underlying evidence on this point was hotly contested below, but that contest should have been irrelevant to the merits determination. DOL has confirmed that "*particularly in restaurant and retail settings*," employees may well be exempt *even if they spend up to 90% of their time on non-exempt tasks.* 69 Fed. Reg. at 22,136-37 (Apr. 23, 2004) (emphasis added). In confirming this long-understood proposition, DOL cited with approval some of the decisions adopting this approach to the exemption: *Jones v. Virginia Oil Co.*, 69 Fed. Appx. 633, 635-38 (4th Cir. 2003) (restaurant manager testified that *70-80% of her time was spent on non-exempt duties*; held manager was exempt "captain of the ship"); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 617-19 (8th Cir. 1991), *cert. denied* 502 U.S. 1073 (1992) (store managers who spend *up to 90 percent of their*

time on "routine non-management jobs such as pumping gas, mowing the grass, waiting on customers and stocking shelves" were exempt managers); *Donovan*, 672 F.2d at 223-27 (restaurant assistant managers who performed non-exempt work the majority of the time were nevertheless exempt); *Kastor v. Sam's Wholesale Club*, 131 F. Supp. 2d 862, 863-70 (N.D. Tex. 2001) (retail bakery manager was exempt even though *he performed non-exempt work 90% of the time*); and *Horne v. Crown Central Petroleum, Inc.*, 775 F. Supp. 189, 190-91 (D.S.C. 1991) (convenience store manager held exempt even though she performed management duties "simultaneously with assisting the store clerks in waiting on customers"; nonexempt tasks were "not nearly as crucial to the store's success as were the management functions").[22]

DOL and the courts agree that in most settings, the proper inquiry focuses on whether the management

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22. The DOL relied on these decisions in its new FLSA regulations addressing the "special circumstances of retail supervisors." 69 Fed. Reg. at 22,136. For instance, the new regulations recognize that separating a retail manager's exempt duties from nonexempt tasks is difficult if not impossible. Instead, the realities of the job require the manager, for example, to "supervise employees and serve customers at the same time." 29 C.F.R. § 541.106(b) (2006). Thus, the new regulations specify that "managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget[,] and authorizing payment of bills may have management as their primary duty" despite spending "more than 50 percent of the time performing nonexempt work such as running the cash register." *Id.* § 541.700(c); *see also* 69 Fed. Reg. at 22,136–37, 22,185–85.

functions are "of principal importance *to the employer*," not the amount of time devoted to particular tasks. *Schaefer v. Indiana Michigan Power Co.*, 358 F.3d 394, 401 (6th Cir. 2004) (emphasis added); *accord* 69 Fed. Reg. at 22,137 (Apr. 23, 2004). The Eleventh Circuit did not meaningfully discuss DOL's view of this factor or conclude that its view was entitled to no deference under applicable principles of administrative law; it simply ignored the issue.

Similarly, although the court below conceded that Petitioner's store managers had unilateral authority to hire some hourly workers, it repeatedly emphasized that they lacked the authority unilaterally to hire or terminate assistant store managers. *See, e.g., Morgan*, 551 F.3d at 1263 n.42, n.44. This suggests another sharp departure from DOL regulations and settled circuit law. First, the authority to hire cashiers should have independently satisfied the "hiring" prong of the DOL's managerial function test regardless of the manager's authority with respect to assistant managers. The Eleventh Circuit cited no law suggesting that a store manager must have the authority unilaterally to hire *everyone* who works in the store to satisfy this aspect of the test.

More fundamentally, the court was apparently under the impression that the store manager's participation in the hiring and firing processes did not "count" for purposes of the exemption test because their authority in those areas was not total: "Although store managers interview and recommend hourly associate candidates, they need district manager approval to hire them. The district manager — not the store manager — also has

the authority to terminate employees. . . ." *Morgan*, 551 F.3d at 1256.

The DOL regulations on this subject are unambiguous. An employee engages in a managerial function when she *recommends* that the employer hire, fire, or promote another person so long as those recommendations are given "particular weight." 29 C.F.R. §§ 541.100(a)(4), 541.105. The court of appeals found it significant that "Family Dollar's policies do not *require* that store managers' hiring or firing recommendations be given any particular weight," *Morgan*, 551 F.3d at 1256 (emphasis added), but the content of Petitioner's written policies should have been irrelevant if those recommendations were *in fact* given weight.

In these respects and many others, the court below re-made the law applicable to FLSA cases like this one in a way that makes it much harder than the DOL envisioned for employers to satisfy the managerial exemption. Some courts have observed that "[i]t is virtually impossible to conceive of a free standing business location without a 'manager.' [A retail enterprise cannot be] manage[d] by remote control." *Bosch v. Title Max, Inc.*, No. CIV.A.03-AR-0463-S, 2005 WL 357411, at *9 (N.D. Ala. Feb. 7, 2005); *see Murray*, 939 F.2d at 618 ("the person 'in charge' of a store has management as his primary duty, even though he spends the majority of his time on non-exempt work and makes few significant decisions.").

The Eleventh Circuit's relaxed standards of proof for plaintiffs already attract more FLSA cases, by far, than any other Circuit. The extraordinary departures from settled law represented in this case seem destined to ensure that the pace of this phenomenon will accelerate with even greater velocity, making it even less likely that an inter-circuit division of authority develops in the future. The question presented is important, the confusion over the applicable standard is intolerable, and the time has come to provide district courts with the guidance for which they have asked.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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APPENDIX

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No.	Case
1.	*White v. Rakhra Mushroom Farm Corp.*, No. CV 08-198-SU, 2009 WL 971857 (D. Or. Apr. 08, 2009) (slip copy)
2.	*Bishop v. AT & T Corp.*, — F.R.D. ——, Civil Action No. 08-468, 2009 WL 763946 (W.D. Pa. Mar. 23, 2009)
3.	*Labrie v. UPS Supply Chain Solutions, Inc.*, No. C08-3182 PJH, 2009 WL 723599 (N.D. Cal. Mar. 18, 2009) (slip copy)
4.	*Merritt v. Wellpoint, Inc.*, Action No. 3:08-CV-272, 2009 WL 482807 (E.D.Va. Feb. 25, 2009) (slip copy)
5.	*Gilbert v. Citigroup, Inc.*, No. 08-0385 SC, 2009 WL 424320 (N.D. Cal. Feb.18, 2009) (slip copy)
6.	*Rodriguez v. SGLC, Inc.*, No. 2:08-cv-01971-MCE-KJM, 2009 WL 454613 (E.D. Cal. Feb. 05, 2009)
7.	*Greenwald v. Phillips Home Furnishings Inc.*, No. 4:08CV1128 CDP, 2009 WL 259744 (E.D. Mo. Feb. 03, 2009) (slip copy)
8.	*Jost v. Commonwealth Land Title Ins. Co.*, No. 4:08CV734 CDP, 2009 WL 211943 (E.D. Mo. Jan. 27, 2009) (slip copy)

9. *Davis v. Westgate Planet Hollywood Las Vegas, LLC,* No. 2:08-cv-00722-RCJ-PAL , 2009 WL 102735 (D. Nev. Jan. 12, 2009) (No. 2:08-cv-00722-RCJ-PAL.) (slip copy)

10. *Gil v. Solectron Corp.*, No. C-07-06414 RMW, 2009 WL 88346 (N.D. Cal. Jan. 09, 2009) (slip copy)

11. *Houston v. URS Corp.*, 591 F.Supp.2d 827 (E.D. Va 2008)

12. *Olmsted v. Residential Plus Mortgage Corp.*, Nos. 08 C 142 and 08 C 419, 2008 WL 5157973 (N.D. Ill. Dec.09, 2008) (slip copy)

13. *McKinney v. United Stor-All Ctrs., Inc.*, 585 F.Supp.2d 6 (D.D.C. 2008)

14. *Wacker v. Personal Touch Home Care, Inc.*, No. 4:08CV93 CDP, 2008 WL 4838146 (E.D. Mo. Nov. 06, 2008) (slip copy)

15. *Mancia v. Mayflower Textile Servs. Co.*, Civil Action No. CCB-08-273, 2008 WL 4735344 (D. Md. Oct. 14, 2008) (slip copy)

16. *Parker v. NutriSystem, Inc.*, NO. CIV. A. 08-1508, 2008 WL 4399023 (E.D. Pa. Sept. 26, 2008) (slip copy)

17. *Russell v. Wells Fargo & Co.*, No. C 07-3993 CW, 2008 WL 4104212 (N.D. Cal. Sept. 03, 2008)

18. *Hoffman v. Securitas Sec. Servs.*, No. CV07-502-S-EJL, 2008 WL 5054684 (D. Idaho Aug. 27, 2008) (slip copy)

19. *Escobar v. Whiteside Constr. Corp.*, No. C 08-01120 WHA , 2008 WL 3915715 (N.D. Cal. Aug. 21, 2008) (slip copy)

20. *Rivera v. Solstice Capital Group Inc.*, No. CV 07-1852 PSG (VBKx), 2008 WL 4384123 (C.D. Cal. Aug. 21, 2008)

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IN THE
Supreme Court of the United States

FAMILY DOLLAR STORES, INC.,

Petitioner,

v.

JANICE MORGAN, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL RETAIL FEDERATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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The National Retail Federation ("NRF") hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Petitioner has consented to the filing of this brief; a copy of its letter of consent has been filed with clerk. NRF files this motion because counsel for Respondents have refused to consent to the filing of this brief.

This case concerns the proper standard for determining when employees are "similarly situated" for purposes of certifying nationwide collective actions brought in cases under the Fair Labor Standards Act ("FLSA") involving the individualized assessment of "primary duty." This issue is critical to employers in the retail industry because the vast majority of those employers have hundreds or thousands of employed exempt individuals sharing the same job title who may contend, under the standards employed by some courts, that they are "similarly situated."

NRF is a retail industry organization broadly supporting the interests of its members, the vast majority of which employ individuals working in retail sales establishments, and which encompass a wide variety of industries and markets. NRF's members and the retail industry as a whole have been disproportionately targeted during the explosion of FLSA collective action suits, and the industry has a common concern with Petitioner regarding the proper basis and/or predictability with which courts have determined that large groups of employees, classified as "exempt" under the FLSA, are deemed to be "similarly situated."

As an industry umbrella organization, NRF has a unique perspective concerning the impact that this case

will have, not just on the Petitioner, but also the many other retail employers who have concerns that have been accumulated from the industry's experiences as a whole. *Amicus* writes in the hope that its broad retail industry perspective and its members' experiences may be of assistance to the Court.

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National Retail Federation ("NRF") submits this *amicus curiae* brief in support of the petitioner, Family Dollar Stores, Inc.[1]

INTEREST OF *AMICUS CURIAE*

NRF is the world's largest retail trade association. Its membership comprises all retail formats and channels of distribution, including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores, as well as the industry's key trading partners. NRF represents an industry with more than 1.6 million retail establishments, whose sales last year alone totaled $4.6 trillion. NRF members employ more than 24 million workers—about one in five American workers. NRF also represents more than 100 state, national and international retail associations.

NRF has an interest in this action because it concerns issues of great significance to its membership and the retail industry as a whole, namely the application of the executive exemption under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* ("FLSA"), to managers of retail establishments, and the procedure used to try collective actions under the FLSA. *See* 29 U.S.C. § 216(b). Specifically, the Court must provide

[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus*, its members and its counsel made such a monetary contribution.

guidance on the correct standard—if any could exist—for the lower courts to use when certifying collective actions in the context of a "primary duty" analysis. NRF maintains that if allowed to stand, the decision below will have a significantly deleterious effect on the interests of its members and the business community as a whole.

SUMMARY OF ARGUMENT

This case provides an opportunity for the Court to issue guidance on the interpretation of the "similarly situated" requirement under the Fair Labor Standards Act ("FLSA") in cases where retail employers have classified certain job titles of their managerial workforce as "exempt" from overtime requirements and that classification is being challenged on the basis of the position's "primary duty." The unique combination of the individualized analysis of each employee's "primary duty," an undefined, unworkable "similarly situated" standard, together with the representative nature of a collective action necessitates this Court's review and action. The Court is urged to provide much needed guidance to the lower federal courts regarding whether and when notice should issue and when a retailer should be required to defend a collective action.

Meeting the "similarly situated" standard under 29 U.S.C. § 216(b) is the only requirement for notice to issue to potentially thousands of managers in an exemption case. This notice provides prospective plaintiffs the opportunity to opt-in to the lawsuit. Thus, it is essential that this process—the preliminary finding

of "similarly situated" followed by notice to the putative class—focus the district court and the putative plaintiffs on the material issues that will ultimately be decided by a jury so that the representative trial can be fair and the litigation be efficient. *See Hoffman-La Roche v. Sperling*, 493 U.S. 165, 170-171 (1989). However, the material issue here—primary duty—is an intense, factual inquiry that delves into the day-to-day duties and responsibilities of each individual—not an analysis of written job descriptions or standard operating procedures that may not be a proper basis for collective treatment.

If allowed to stand, the decision below permits the default definition of "similarly situated" only by negative reference to what it "does not mean." *See Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1260 (11th Cir. 2008). Left with no guidance, lower courts have developed "lenient," contradictory, and unpredictable standards as to when massive groups of potential plaintiffs are "similarly situated" such that they should be given notice and an opportunity to "opt-in" to a lawsuit. *See Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1213-1214 (5th Cir. 1995); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1096-1097 (11th Cir. 1996). The lenient standard for notice permits the invitation of opt-in plaintiffs on inapplicable or irrelevant grounds—such as whether they hold the same job title as the named plaintiffs—rather than whether they the possess the facts in common with the named plaintiffs that a jury will be asked to determine. After notice is issued, a retailer cannot escape the costly and protracted litigation of what is an inherently individualized assessment of the primary duty of its managerial

employees except by settling early at a high price, and even then, with no certainty or finality unless it also reclassifies the job title at issue.

This lack of a notice standard, developed over the course of time and exemplified by the *Morgan* case, impacts negatively both the courts and litigants in three distinct phases of litigation. First, historically, notice has been issued on a "very lenient" standard that some courts have held can be met based on only the pleadings and a few affidavits. *Mooney*, 54 F.3d at 1213-1214. In cases where "primary duty" is the only dispute, the notice at such an early stage necessarily focuses on issues not material to the jury or other fact-finder under the primary duty analysis. Thus, the managers opt in based on criteria (such as job classification or salaries) that do not assist in determining whether their case is one that is similar to or representative of the plaintiffs' case. The often-used rationale for the lenient notice standard is that it is "just notice" and the class may later be dismantled through decertification. However, this justification ignores the harm done by the creation of a potential thousand-plus plaintiff class. Court approval of notice often amounts to "game over" for retailers because the extraordinary cost of litigating the conditional certification to stop a representative trial is "rewarded" by obtaining decertification and then defending thousands of individual cases created by the initial notice. If the case goes forward to a "representative trial," the retailer is faced with the prospect of proving the exemption defense on a manager-by-manager basis. The "lenient" standard results in no standard where the inquiry is the highly-individualized "primary duty" of an employee. Moreover,

there is no immediate appellate jurisdiction to review the initial certification decision—it is a decision cast in stone. *See Comer v. Wal-Mart Stores, Inc.*, 454 F.3d 544, 548 (6th Cir. 2006) (applying *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46 (1949)); *Baldridge v. SBC Commc'ns, Inc.*, 404 F.3d 930, 932-33 (5th Cir. 2005). Many retailers may be forced to succumb to the strong economic incentive to settle as opposed to defend themselves regardless of the lawfulness of their classification decisions.

Second, the standard for determining "similarly situated" at the "second step" decertification stage must be defined. For example, the court below looked, in large part, at factors that were themselves consistent with the FLSA but were "uniform" in their application—*e.g.*, the employers' decision to classify managers as exempt, the manager's job description, and the existence of standard operating procedures. Such standard procedures are not what the jury will be asked to make findings upon, and the retailer cannot use them to support its exemption classification. Thus, the application of the current similarly "situated standard" accepts non-material "evidence" as the glue that binds a class for the upcoming representative trial. The irony is that while these standardized business procedure documents are lawful and necessary to every retailer's survival, regardless of their size, the employer is not allowed to rely upon them to establish the exempt nature of the job—thus creating a "one-way street" of analysis. These documents are also the basis for courts to bind the retailer to a trial by a group of plaintiffs whose success on the merits is based on the individual conduct of a select few. Without a proper standard that

correlates the definition of "similarly situated" to the relevant ultimate inquiry, the retailer is faced with incredible costs and having to overcome hand-picked plaintiffs who in fact may not accurately represent the rest of the class.

Finally, the lack of a proper standard results in a tortured attempt to try the "similarly situated" plaintiffs together on the "primary duty" evaluation. The Eleventh Circuit concluded that since the employer has the burden to prove the exemption's required elements, then the defendant should call all of the plaintiffs and opt-ins to show they all are exempt. *See Morgan*, 551 F.3d at 1278. The cost of trying many individual cases—even collectively—and bringing in all collateral witnesses necessary to prove what happens during the workday is so prohibitive as to be fundamentally a lack of due process. And if required to call and prove the exemption regarding each plaintiff at trial, the proceedings cannot be judicially efficient. Retailers, whether the largest multi-department stores, such as Home Depot or Wal-Mart or the smallest stand-alone "small box" retailers, often cannot risk the exposure and litigation costs. As a practical matter, the procedural handling of these cases effectively writes the executive exemption out of the FLSA.

Moreover, the decision will not be limited to one circuit. Managers employed by national retailers with standard operating procedures and job descriptions are, by definition, now "similarly situated" in the Eleventh Circuit. Failure to review this decision and to announce a proper standard in the context of primary duty likely will cause virtually all such cases to be brought in the

Eleventh Circuit and will effectively create an unreviewable national standard. Retailers will be forced to settle—and/or reclassify its employees—and no other circuit will likely review the standard even if another retailer is willing to risk its whole business model and incur the enormous liability exposure that goes with it.

REASONS FOR GRANTING THE PETITION

I. THE LACK OF MEANINGFUL, CLEAR STANDARDS FOR ASSESSING WHEN EMPLOYEES ARE "SIMILARLY SITUATED" IN "PRIMARY DUTY" CONTEXT CREATES A MAGNET FOR WASTEFUL LITIGATION.

Retail employers and the lower federal courts need a clear and meaningful standard for what constitutes a "similarly situated" group of employees for the purpose of collective action certification under 29 U.S.C. § 216(b) in executive exemption cases involving the central issue of "primary duty." As the Eleventh Circuit candidly explained in this case, "we [have] explained what the term does not mean—not what it does." *Morgan*, 551 F.3d at 1260.[2]

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[2] The Eleventh Circuit made clear that there is no defined standard to be followed at either the conditional or decertification stages of collective action procedure, stating: "We have described the standard for determining similarity, at this initial stage, as 'not particularly stringent,' 'fairly lenient,' 'flexible,' 'not heavy,' and 'less stringent than that for joinder under Rule 20(a)'". *Id.* at 1260-61; "The second stage [of certification] is less lenient, and the plaintiff bears a heavier burden . . . Exactly how much less lenient we need not specify, (Cont'd)

The Petition should be granted despite the lack of an observable circuit-level split in authority on the treatment of "primary duty" under the "similarly situated" provisions of § 216(b) because the lack of "split" has certainly proven to be no barrier to inconsistent rulings—even among different cases involving the same employer and same job title. *See* Pet. at p.17-18.[3] The refusal of courts in other circuits to certify collective actions—involving the same company and job title at issue here[4]—is a clear illustration of the

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(Cont'd)
though logically the more material distinctions revealed by the evidence, the more likely the district court is to decertify the action." *Id.* at 1261; "We also refused to 'specify how plaintiffs' burden of demonstrating that a collective action is warranted differs at the second stage.'" *Ibid.*; "[T]he similarities necessary to maintain a collective action under § 216(b) must extend beyond the mere facts of job duties and pay provisions' and encompass the defenses to some extent." *Id.* at 1262 (internal cites omitted from all).

[3] Citing cases refusing certification or decertifying collective actions because of the individual inquiry required, including *Johnson v. Big Lots Stores, Inc.*, 561 F. Supp. 2d 567, 586-87 (E.D. La. 2008); *Smith v. Heartland Auto. Servs.*, 404 F. Supp. 2d 1144, 1151-1154 (D. Minn. 2005); *Riech v. Homier Dist. Co.*, 362 F. Supp. 2d 1009, 1013-1014 (N.D. Ind. 2005); *Mike v. Safeco Ins. Co.*, 274 F. Supp. 2d 216, 220-21 (D. Conn. 2003); *Morisky v. Pub. Serv. Elec. & Gas*, 111 F. Supp. 2d 493, 498-99 (D.N.J. 2000).

[4] *See* Pet. at p. 18 (noting that within the past two years, district courts within the Fourth Circuit have twice denied certification of collective actions involving Family Dollar store managers).

uncertainty resulting from lack of clarity regarding application of "similarly situated" in primary duty cases. Despite no split of "circuit authority" there is an undeniable "split of reasoning" among the lower courts resulting from the lack of guidance thus causing the divergent rulings. Because the decision below has offered nothing more than a reference to language in other non-FLSA, non-primary duty opinions as to what "similarly situated" does *not* mean, the lack of clarity warrants this Court's guidance. *See Morgan*, 551 F.3d at 1260.

A. The FLSA's Executive Exemption, "Primary Duty" And Collective Action Provisions.

Although the FLSA requires that employees be paid "time and a half" for work over forty hours per week, the FLSA provides an exemption from its overtime requirement for "any employee employed in a bona fide executive . . . capacity." *See* 29 U.S.C. § 207(a)(1). In order to qualify for the executive exemption, the employee must be one: (a) whose compensation is on a salary basis of not less than $250 per week, (b) who regularly directs the work of two or more other employees, and (c) whose primary duty consists of the management of a recognized subdivision of the employer's enterprise.[5]

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[5] This is known as the "short test" and was applicable until August 23, 2004. At that time, the Department of Labor amended the regulations associated with the executive exemption. The minimum salary requirement was increased to $455/week and an additional element was added: the authority

(Cont'd)

See 29 C.F.R. § 541.1 (2003) and 29 C.F.R. § 541.100 (2006). Typically, the sole legal issue in executive exemption misclassification cases is whether "management"[6] was each plaintiff's "primary duty."

The Department of Labor's regulations further provide guidance when determining "primary duty" under the executive exemption. When the percentage of time spent on "non-managerial" duties is more than 50%, the regulations instruct that four other factors must be considered: (1) relative importance of managerial duties to non-managerial tasks; (2) the frequency with which the employee exercises discretionary power; (3) the employee's relative freedom from supervision; and (4) the relationship between the

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(Cont'd)

to hire or fire other employees or whose suggestions as to hiring, firing advancement, promotion or any other change of status of other employees is given particular weight.

[6] The DOL defines management duties to include: interviewing and selecting employees; training employees; setting employees' hours; setting or adjusting employees' rates of pay; directing the work of employees; maintaining sales records/reports; appraising employees' job performances; recommending employees for promotions; handling employee complaints or grievances; planning the work; apportioning the work among the employees; controlling flow of merchandise through store; providing safety of the employees; providing security of the property; controlling budgets; and monitoring and implementing legal compliance measures. *See* 29 C.F.R. § 541.102 (2003) and (2006).

employee's salary and the wages paid employees doing similar non-exempt work. *See* 29 C.F.R. § 541.103 (2003).[7]

Pursuant to 29 U.S.C. § 216(b), an employee may maintain an action to recover overtime on behalf of himself or other employees "similarly situated". The FLSA does not define the term "similarly situated." Left with no direction, courts have attempted to fashion their own meaning. Whatever definition chosen by a court, most have agreed that the decision as to whether there are "similarly situated" individuals is addressed at two stages. *See, e.g.*, *Mooney*, 54 F.3d at 1213-1214; *Grayson*, 79 F.3d at 1097.

First, at the "notice" stage and applying a "lenient," "not particularly stringent," "not heavy," "flexible" standard, plaintiffs show they are "similarly situated with regard to their job requirements and pay provisions." *Morgan*, 551 F.3d at 1260-1262. At this early stage, courts determine whether a group of employees should be invited to join the lawsuit. The second determination occurs "once the case is ready for trial," and applies a "less lenient" standard based on the evidence revealed during discovery—after all potential class members have decided whether to join the lawsuit. *Id.* at 1261. The ultimate certification determination can be reviewed—after trial—for "abuse of discretion" as to whether there was enough evidence to establish whether the plaintiff employees are similarly situated

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[7] Under 29 C.F.R. § 541.700 (2006), revised effective August 23, 2004, one of the factors has since been eliminated from the regulations—the frequency with which the employee exercises discretionary powers. *Cf.* 29 C.F.R. § 541.103 (2003).

to one another, but only long after the notice has already been issued and potentially thousands of individuals have joined. *Id.* at 1260.

B. It Is Critical That The Court Define The Similarly Situated Standard To Reconcile Collective Actions With The Individualized Nature of The "Primary Duty" Analysis.

The problem of an uncertain and ill-defined "similarly situated" standard is compounded by the leniency with which courts facilitate notice to potential opt-in plaintiffs. Ideally, the district judge would serve the role of gatekeeper for the purpose of efficiently managing the joinder of parties. *See Hoffman-La Roche*, 493 U.S. at 170-171 ("the court has a managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way"). Instead, the "lenient" opt-in notice is liberally granted, "usually based only on the pleadings and any affidavits which have been submitted." *Mooney*, 54 F.3d at 1213-1214.

The sheer volume of potential plaintiffs—and the prospect of years of expensive, protracted discovery and pre-trial proceedings—forces employers to consider capitulation regardless of the merits of the exemption claim. This is especially the case given that there is no interlocutory review and there is no way to "un-notice" a plaintiff once he or she has opted in. *See Comer*, 454 F.3d at 548; *Baldridge*, 404 F.3d at 932-33. Employers are thus faced with a difficult choice between engaging

in "bet the company" litigation, negotiating a large settlement based largely on the unpredictable and uncertain standard of class certification, and/or reclassifying exempt employees who may well properly be classified that way, not because they are required by law, but in the interests of resolving litigation risks. *Cf. Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) (noting that with respect to the pressure to settle cases with unpredictably large punitive damage awards, "[t]he real problem, it seems, is the stark unpredictability . . . Courts of law are concerned with fairness as consistency").

As a matter of fundamental fairness, a "fairly lenient standard" for issuing notice should at least be defined by what it "is," not what it "is not"—particularly when the ramifications can be so significant. And that standard, even more if lenient than under Federal Rule of Civil Procedure 23, should at least require a showing of factual allegations supported by evidence that would establish a violation of law without resort to highly variable individualized analysis. Only then would the resulting discovery costs and expansion of the litigation be justified. *Cf. Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007):

> it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago . . . 'a district court must retain the power to insist upon some specificity in pleading before allowing a

> potentially massive factual controversy to proceed'

(internal citations omitted). A review of the factors used in making the primary duty determination shows why no single person can be representative of all. *See* discussion in part I (A), *supra*. Some employees may exercise discretion frequently; some may not. A store manager in Boston, Massachusetts may be relatively free from supervision while another manager in Pascagoula, Mississippi may not be. Some managers will have personally interviewed and hired dozens of employees, and others hired none—and perhaps for different reasons not related to the exemption. Yet, each side will be motivated to hand-select managers at trial who are likely to be the most polarized examples and thus the *least* representative of all.

In certain situations, in which notice is issued on the basis of the factors to be decided by a jury, a collective action can be an appropriate mechanism to gain the efficiencies of representative litigation. For example, if there was an alleged policy or practice of docking exempt employees' salaries in violation of the "salary basis" test,[8] a court might find that a group of similarly situated employees is impacted by the policy and grant notice. The court's only inquiries then would be to find whether the practice actually occurred and whether each person in the class was impacted. Employees receiving notice would know if the allegations applied to them, as they would know with

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[8] *See* 29 C.F.R. §§ 541.602-.603 (2006).

great certainty whether or not their pay had ever been "docked." Thus, in some cases, the lack of a workable definition for "similarly situated" would not prevent courts from managing efficient collective actions and providing class members with sufficient information to make informed decisions about whether to participate. *See Hoffman-La Roche*, 493 U.S. at 170-171.

But collective actions challenging whether a manager's "primary duty" is management are completely different from the example above, and expose the Achilles heel of the undefined "similarly situated" standard. The Eleventh Circuit's own recent precedent further reinforces the notion that a retail employer can only defend an executive exemption case on a fact-intensive, individualized basis. As explained in *Rodriguez v. Farm Stores, Inc.*, primary duty is analyzed by reviewing the specifics of each of the employees' duties, based on all facts in a particular case, and is ultimately found in the details of the job. 518 F.3d 1259, 1264 (11th Cir. 2008) (affirming jury verdict finding 26 store managers to be non-exempt, in a non-collective action in which each plaintiff testified).

Thus, in a primary duty case, the court has no discrete policy or practice that can be identified and litigated. There are over 20 non-exclusive management duties described in the Department of Labor's regulations and five non-exhaustive factors to be considered, none of which are dispositive or weighted in any particular order. *See* 29 C.F.R. § 541.102 (2003); 29 C.F.R. § 541.103 (2003); 29 C.F.R. § 541.102 (2006); 29 C.F.R. § 541.106 (2006). Courts are simply left to ask each prospective opt-in whether each believes that his or her primary duty was management, a determination

that is left for each recipient to interpret when deciding whether to join the suit.

If district courts are to authorize nationwide notice on the basis of non-dispositive, subjective allegations of misclassification of exempt employees, retailers will have no meaningful notice as to which practices may lead to substantial exposure under the FLSA. Individuals receiving notice also have no reasonable basis upon which to make an informed decision as to whether to join the subject litigation. Significantly, once the nationwide notice is ordered, the pressure on the employer to settle even meritless claims increases considerably—all without the plaintiffs having to submit *any* evidence of an illegal practice, and with no guidance as to the propriety of the classification in the first instance.

Indeed, the court below actually held that the uniformity of the *employer's* job descriptions, corporate polices, and operating procedures supported the "substantial similarity" of the *employees*. *Morgan*, 551 F.3d at 1242, 1245, 1247-48. Virtually *all* retail and service chains with nationwide operations have long used highly-detailed, uniform, and regimented operating policies and procedures. *See, e.g., Donovan v. Burger King*, 675 F.2d 516, 521 (2d Cir. 1982) ("the economic genius . . . lies in providing uniform products and service economically in many different locations and that adherence by Assistant Managers to a remarkably detailed routine is critical to commercial success"). Under the decision below, however, even if nothing in a retailer's standardized job descriptions, policies or procedures is found to actually contradict the application of the executive exemption,

the very *existence* of those uniform practices may be used to support the determination that all store managers were "similarly situated" with respect to their allegations of misclassification. But, as the litigation proceeds, this uniformity serves no use to the retailer who must nonetheless defend the merits of the exempt classification decision individually. At the point of trial, courts turn their attention to the details of each employee's duties and state that job titles and concepts such as being "in charge of the store" are not material. *See, e.g., Rodriguez*, 518 F.3d at 1264. The basis for the purported similarity thus used to form the class in the first instance is never tried and cannot be used as a defense. [9]

The "representativeness" concern can best be illustrated by the example of ineffective or incompetent manager, whose exemption claim would otherwise be denied because of his or her failure or refusal to perform the managerial tasks required of the job.[10] The absence

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[9] The unworkable standard is compounded by the fact that courts have made clear that mere job titles or job descriptions cannot be used to establish the exemption defense. *See, e.g., Ale v. Tenn. Valley Auth.*, 269 F.3d 680, 688-89 (6th Cir. 2001); *Reyes v. Texas EZPawn*, 459 F. Supp. 2d 546, 553 (S.D. Tex. 2006); *Johnson*, 561 F. Supp. at 579.

[10] *See, e.g., Stein v. J.C. Penney Co.*, 557 F. Supp. 398, 405 (W.D. Tenn. 1983) ("the plaintiff . . . spent an unusually large amount of time doing non-exempt work. But to the extent that is true, it was because of his own failure or inability to direct others . . . His failure to properly apportion the work, as was

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of a clear certification standard allows these same managers to be the instigators of a collective action—assuming they were uniformly classified and subject to a uniform standard operating procedure—a burden easily met by most retail managers. The irony is that these individuals, who could not prevail on their own accord, could nonetheless be the genesis of a thousand-plus person collective action *and* recover damages based on other individuals who may have actually been misclassified. Plainly, such a result was not contemplated by the courts or the drafters of the FLSA.

The potential impact of this ruling on virtually every retailer nationwide can be scarcely overstated. Even if a retailer's policies clearly dictate that a class of employees should be performing exempt managerial duties, the mere *uniformity* of those policies can still be used to force that retailer to litigate against thousands of employees at the expense of millions of dollars and the risk of hundreds of millions in potential liability.[11] Under these circumstances, the additional pressure to reclassify the employees is so great as to

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within his discretion to do, does not convert an exempt job into a non-exempt one"); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1325 (S.D.N.Y. 1983) (in the context of analysis of the "bona fide executive" exemption under ADEA, holding that "an unresourceful employee should not benefit in this regard from his failure to perform adequately the duties that are expected of him . . . an employee would not escape the exemption because [of] his lack of energy, imagination or judgment").

[11] *See, e.g.*, *Morgan*, 551 F.3d at 1242, 1245, 1247-48. *Ale*, 269 F.3d at 688-89; *Reyes*, 459 F. Supp. 2d at 553 (S.D. Tex. 2006); *Johnson*, 561 F. Supp. 2d at 579.

practically eliminate the viability of the exemption under the regulations with regard to first-line exempt managers. From the retailers' perspective, reclassification may be the only alternative to having a hodgepodge of plaintiffs' claims joined under standards more lenient than required by the Federal Rules of Civil Procedure—and the ensuing requirement to call and prove the exemption as to all in one case, all while expending tremendous resources.

II. TWO-STEP REVIEW OF CERTIFICATION DOES NOT CURE THE LACK OF A CLEAR STANDARD

As the Eleventh Circuit noted in this case, the procedural choice ultimately created by the "lenient" conditional certification was "whether the case should proceed as 1,424 individual actions" or as a single collective action tried on the basis of representative testimony. *Morgan*, 551 F.3d at 1245. Thus, initial certification has far more implications than "just notice." It is a decision likely to result in the irreversible magnification of the overall size of the litigation. And while the trial of thousands of individual cases seems inefficient and anomalous, it is effectively required where district courts have leniently granted nationwide notice in executive exemption cases only to conclude much later that a "similarly situated" finding was unwarranted.

Moreover, an employer "cannot rely on an insufficient number of witnesses being called by the Plaintiffs to meet [its] burden of proof on its own affirmative defense." *Morgan*, 551 F.3d at 1278. Thus,

an employer's only means of countering the hand-selected plaintiffs who testify at trial is to depose as many as possible (or permitted by the court) and then call the ones most likely to meet the requirements of the exemption. But how many employees must a defendant call in order to solidly convince a fact finder that the hundreds of unseen others are also exempt? As seen in *Johnson v. Big Lots Stores,* when the plaintiffs'/opt-ins' testimony differs, the result is that nothing consistently "representative" emerges. *See Johnson*, 561 F. Supp. 2d at 585. In such a case, the only proper result is decertification—and the trial thus results is a draw, and the goal of "judicial efficiency" is thwarted.

In the case below, the district court concluded that the thousands of plaintiffs and opt-ins were sufficiently similar such that each did not require his or her own trial. But other courts have come to differing conclusions—even *after* denying decertification motions. In *Johnson*, an FLSA collective action was brought by assistant store managers who alleged that they were misclassified as exempt. *Id.* at 569. Although their formal job descriptions included managerial responsibilities, the plaintiffs contended that their actual managerial duties were not reflective of management and that, under strict corporate guidelines, they mainly performed nonexempt tasks that had little to do with managing the store. *Ibid.* Under the lenient standard of conditional certification, the court facilitated notice of the lawsuit to assistant store managers employed by Big Lots during a three and a half year period. *Ibid.*

Following the opt-in of over 1,200 plaintiffs and depositions of a dozen opt-ins, the court denied Big Lots'

motion to decertify the class, based on "strong similarities in job duties among those plaintiffs deposed" and also based on the "plaintiffs' claim that Big Lots maintained a *de facto* policy and practice of misclassifying the ASM job position." *Id.* at 570. At trial, the court heard seven days of testimony which revealed that the plaintiffs had no evidence that Big Lots sought to consciously deny managerial responsibilities to the plaintiffs. *Id.* at 579. Rather, the "opt-in plaintiffs' characterizations of their day-to-day work activities presented through trial erased the Court's earlier understanding that plaintiffs were similarly situated. What became obvious after the Court considered all of the evidence is that the 'representative' testimony is not representative of plaintiffs' experiences." *Ibid.* Accordingly, the *Johnson* court was left with no choice but to decertify the class at that time and thereby set the wheels in motion for the filing of 212 individual FLSA exemption claims[12] from the remaining 936 *Johnson* opt-in plaintiffs.[13]

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[12] *See Adams, et al. v. Big Lots Stores, Inc.*, No. 08-cv-04326 (E.D. La. *filed* Sept. 8, 2008) (85 decertified opt-ins); *Beringer, et al. v. Big Lots Stores, Inc.*, No. 08-cv-4327 (E.D. La. *filed* Sept. 8, 2008) (21 decertified opt-ins); *Brown, et al. v. Big Lots Stores, Inc.*, No. 08-cv-4328 (E.D. La. *filed* Sept. 8, 2008) (4 decertified opt-ins); *Chappell, et al. v. Big Lots Stores, Inc.*, No. 08-cv-4329 (E.D. La. *filed* Sept. 8, 2008) (23 decertified opt-ins); *Abramczyk et al v. Big Lots Stores Inc.*, No. 08-cv-4330 (E.D. La. *filed* Sept. 8, 2008) (79 decertified opt-ins).

[13] *See Johnson*, 561 F. Supp. 2d at 569 (collective proceeding involved 936 of approximately 1,200 individuals who consented to opting in to the collective action).

Similarly, in *Brown v. Dolgencorp, Inc.*, a collective action filed in 2002 and involving exemption claims of Dollar General store managers, the court decertified the class at trial after four years of litigation, hundreds of depositions, and the expenditure of substantial resources.[14] The legacy of *Brown* is that approximately 1,400 decertified opt-in plaintiffs are now pursuing individual FLSA actions that have been and will be transferred to districts across the country.[15]

These outcomes demonstrate the inherent flaw in leniently granting notice in primary duty cases where the only thing tying the plaintiffs together is their subjective belief that they are nonexempt, even though no material facts are alleged that constitute FLSA violations. The impact to retailers is significant. It chills the use of a long-standing, lawful exemption provided by Congress. Retailers now know that even if they classify management positions correctly, they are still subject to class litigation being certified, with all of its inherent costs, and that there will be no meaningful review of the decision. Once at trial, employers are required to defend the application of the exemption on an individual, case-by-case basis. If they prevail at the decertification stage, they are faced with defending the

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[14] *See Brown v. Dolgencorp, Inc.*, No. 7:02-cv-673, (N.D. Ala. *order* Aug. 7, 2006) (decertifying class).

[15] *See Gray, et al. v. Dolgencorp, Inc.*, No. 7:06-cv-01538 (N.D. Ala. *filed* Aug. 7, 2006) (2,485 individual plaintiffs); *see also, Gray*, Dkt. No. 85 "Joint Proposed Plan for Transferring Remaining Cases" (N.D. Ala. *joint motion submitted* Nov. 21, 2008).

defeated class members across the country and expending millions of dollar on further individualized discovery and trials in the process. Even if retail employers settle these cases, they have bought no finality, as future employees and those not opting in will be encouraged to freely file new collective actions, unless the employer ultimately re-classifies its employees.

This problem vexing retail employers requires an immediate a solution. One can readily be provided by this Court with the formation of a clear standard for determining when employees are "similarly situated" with respect to determinations of "primary duty" under the FLSA.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Petitioner,

v.

JANICE MORGAN, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Amicus curiae DRI—The Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys involved in the defense of civil litigation.[1] DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys and the civil justice system, to promote the role of defense attorneys, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues of fundamental importance to its members and to the judicial system. This case implicates such issues. DRI and its members have considerable experience defending employers in litigation involving "collective actions" under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b), as well as under the Age Discrimination in Employment Act ("ADEA") and the Equal Pay Act, which expressly incorporate FLSA's collective action provision, see *id.* §§ 206(d)(3), 626(b). Even though the collective action provision has been

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[1] Pursuant to Supreme Court Rule 37.2, counsel of record for all parties received timely notice of *amicus curiae*'s intent to file this brief, and the parties have consented to the filing of this brief. Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amicus curiae* DRI states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief.

in force for the better part of a century, the application of § 216(b)'s certification procedures has created only one consistent result—confusion among the lower courts.

This unpredictability presents great threats to and imposes considerable costs on employer-defendants nationwide, and hinders the ability of DRI and its members to offer useful counsel. DRI is especially concerned about the decision below. The Eleventh Circuit has promised a future of continued unpredictability in the law by reaffirming its self-described "*ad hoc*" standard for determining whether employees are "similarly situated," which is essential to pursuing a collective action. In doing so, the court of appeals guaranteed that its district courts will become the forum of choice for FLSA collective actions. This Court should grant review to ensure that uniform rules guide the collective actions that increasingly consume judicial dockets nationwide.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE LOWER COURTS HAVE JETTISONED ANY MEANINGFUL STANDARDS GOVERNING CERTIFICATION EVEN AS COLLECTIVE ACTIONS HAVE PROLIFERATED.

In nearly uniform fashion, the lower courts have discarded standards, existing at the time of FLSA's enactment and for years thereafter, that would have promoted predictable and efficient certification decisions. Similarly, the lower courts have swept aside this Court's instructions in *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989), that judicial economy and manageability considerations apply equally to § 216(b) as they do to Rule 23 of the Federal Rules of Civil Procedure. Instead, the courts

below have adopted a "standard" that they describe as being "*ad hoc*," and that lives up to its name by producing inconsistent results in similar cases.

Improvisation is no substitute for fairness, and thus this Court's review is essential. The arbitrariness of the *ad hoc* approach is magnified by the proliferation of collective actions, as well as the courts' increasing willingness to certify such actions. This exacts a great toll on employers. Subjecting employers and their counsel to such unpredictable litigation costs and outcomes is untenable. The current approach creates inefficiency across businesses, which may have severe repercussions for employees in these uncertain economic times.

There is, however, a better approach available. As shown below, the principles set forth in *Sperling* and in applications of § 216(b)'s certification standard before the modern Federal Rules of Civil Procedure could return predictability to collective action litigation, alleviate the inefficiencies under which employers and their counsel operate, and provide protection to non-representative plaintiffs in these proceedings.

A. Even As Collective Actions Grow At An Exponential Rate, Certification Analysis Remains Unsettled And Unpredictable.

The Petition and the brief of the Chamber of Commerce of the United States recognize that the number of FLSA collective actions is increasing dramatically. Pet. 30; Br. of Chamber of Commerce 6-7. An article that recently appeared in one of *amicus*'s publications adds that "FLSA class and collective action litigation has * * * grown at an exponential pace" since 2004, growing at a rate of over 120 percent between 2004 and 2008. Paul A.

Wilhelm, *Actions on the Rise: Top Five Trends in Wage & Hour Litigation*, 51 No. 4 DRI For Def. 48 (2009). Even before this most recent spike, commentators had characterized these suits as the "the 'claim du jour'" of the plaintiffs' bar. Michael W. Hawkins, *Current Trends in Class Action Employment Litigation*, 19 Lab. Law. 33, 50 (2003). This "surge is not expected to end soon." Wilhelm, *supra*; *accord*, Robert E. Craddock, Jr. & Kim Koratsky, *Employers Beware: Fair Labor Standards Act Collective Actions Continue to Skyrocket*, Memphis Bus. J., Nov. 7, 2008. Indeed, collective actions alleging, as here, that an employer has misclassified its employees as exempt from FLSA's overtime requirements "continue to proliferate." Wilhelm, *supra*.

Despite more than 70 years and a recent expansion in the level of judicial activity, the "similarly situated" standard for certification under § 216(b) remains undefined. Commentators have remarked that "[§ 216(b)] provides no guidance as to what factors courts should look to when applying the 'similarly situated' standard." Hawkins, *supra*, at 47.[2] One judge recently lamented: "Unfortunately, neither the FLSA nor its implementing regulations define or provide guidance on the meaning of the term 'similarly situated.'" *Howard* v. *Securitas Sec. Servs., USA Inc.*, No. 08 C 2746, 2009 WL 140126, at *1 (N.D. Ill. Jan. 20, 2009); see *Keef* v. *M.A. Mortenson Co.*, No. 07-CV-3915(JMR/FLN), 2009 WL

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[2] *Accord*, James M. Fraser, Note, *Opt-In Class Actions Under the FLSA, EPA, and ADEA: What Does It Mean to Be "Similarly Situated"?*, 38 Suffolk U. L. Rev. 95, 111 (2004); Brian R. Gates, Note, *A "Less Stringent" Standard? How to Give FLSA Section 16(b) a Life of Its Own*, 80 Notre Dame L. Rev. 1519, 1521 (2005) (same).

465030, at *1 (D. Minn. Feb. 24, 2009) ("similarly situated" lacks a "recognized definition"); *Shushan* v. *Univ. of Colo.*, 132 F.R.D. 263, 266 (D. Colo. 1990) (calling the provision "vague").

Although, as detailed below, the application of the "similarly situated" standard need not be as formless as it has become, *infra* § I.B, the majority of courts have aggravated the uneven application of the standard by consciously rejecting a consistent methodology and instead adopting an "*ad hoc*" approach to certification. See, *e.g.*, Pet. App. 54a n.36, 55a (relying on what "similarly situated" "does not mean"). Under the "*ad hoc*" approach, a court uses a two-stage analysis to decide on a case-by-case basis whether plaintiffs are "similarly situated." See *id.*; 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1807 (3d ed. 2005) (collecting cases). During the first stage, which often occurs prior to any discovery and certainly takes place before substantial discovery, courts make their initial certification decision. See *Thiessen* v. *Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1102-03 (10th Cir. 2001); *Hipp* v. *Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218 (11th Cir. 2001) (per curiam); *Mooney* v. *Aramco Servs. Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) (decision is "usually based only on the pleadings and any affidavits which have been submitted"), *overruled on other grounds by Desert Palace, Inc.* v. *Costa*, 539 U.S. 90 (2003). At this stage, the "similarly situated" showing is completely formless and easily satisfied by plaintiffs. As the court below summarized and the plaintiffs' bar enthusiastically has echoed, the standard is "lenient" and "'considerably less stringent'" than those required under Rule 20(a) for joinder, Rule 42 for separate trials, or Rule 23. Pet. App. 57a-58a; Laura

L. Ho, *Collective Action Basics*, 10 Employee Rts. & Emp. Pol'y J. 427, 428 (2006).

Once the collective action is conditionally certified, the putative class members are afforded notice and an opportunity to opt-in to the class action. See 29 U.S.C. § 216(b); *Sperling*, 493 U.S. at 170-71. Moreover, the case then proceeds on a certified basis *through discovery on the merits*. Only after discovery has closed does the court reach, typically upon a defendant's motion for decertification, the second stage determination as to whether discovery shows that the plaintiffs remain "similarly situated." See, *e.g.*, Pet. App. 58a-59a; *Thiessen*, 267 F.3d at 1103. This inquiry is conducted using a slightly more searching, but still arbitrary "*ad hoc*" analysis, one "remarkable" for its failure to "give a recognizable form to a[] [§ 216(b)] representative class." *Mooney*, 54 F.3d at 1213; see *Shushan*, 132 F.R.D. at 266, 268 (approach is "extraordinary" for its "formless[ness]"). In effect, the two-stage *ad hoc* approach presumes that a collective action will proceed on a certified basis, shifting the burden to the defendant at the last moment to show why the case should not be tried collectively.

Not surprisingly, as the petition and *amici* explain, outcomes under the *ad hoc* approach are chaotic. See Pet. 23-31; Br. of Chamber of Commerce 6-8; Br. of Nat'l Retail Fed. 7-9, 19-20.[3] Materially

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[3] Although as recently as 1995, the Fifth Circuit was able to declare that "no representative class has ever survived the second stage of review" under the *ad hoc* approach, *Mooney*, 54 F.3d at 1214, representative actions, like the instant one, now regularly survive the decertification stage under the *ad hoc* approach, *see, e.g.*, *Rawls* v. *Augustine Home Health Care, Inc.*, 244 F.R.D. 298, 300-02 (D. Md. 2007); *Hill* v. *Muscogee County Sch. Dist.*, No. 4:03-CV-60 (CDL), 2005 WL 3526669, at *5 (M.D.

indistinguishable cases are treated very differently. For example, two store managers who received notice in this case but filed suit in another district were found to be exempt, see *Fripp* v. *Family Dollar Stores*, No. 2:03-cv-721-DCN (D.S.C. Sept. 28, 2004); *Davis* v. *Family Dollar Stores*, No. 3:03-cv-170-CMC-JRM (D.S.C. Sept. 29, 2004), despite the Eleventh Circuit's conclusion that all store managers were "similarly situated" with respect to their exemption status, Pet. App. 62a; see also *Grace* v. *Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699, at *3 (W.D.N.C. Sept. 6, 2007) (denying certification in a parallel putative collective action filed by Family Dollar store managers because "each individual manager had different duties"). This is precisely the sort of irreconcilable outcome that naturally flows from *ad hoc* analyses, and exactly why review is needed to establish uniform rules.

B. Under *Sperling*, Rule 23 Should Guide Certification Pursuant To Section 216(b).

The unpredictability of the *ad hoc* approach could be overcome, and greater uniformity immediately injected into § 216(b)'s "similarly situated" standard, if this Court simply were to require that lower courts incorporate well-established standards governing Rule 23 certification in the collective action analysis. To do so, the Court need only instruct that the lower courts heed its guidance from *Hoffmann-La Roche Inc.* v. *Sperling*, 493 U.S. 165 (1989).

Ga. Dec. 20, 2005); *Moss* v. *Crawford & Co.*, 201 F.R.D. 398, 411 (W.D. Pa. 2000). Thus, notably, it is not only the number of FLSA collective action filings but also the number of certifications that has proliferated as the *ad hoc* approach has taken hold.

In *Sperling* this Court held that a district court may authorize and facilitate notice to potential members of a collective action brought under the ADEA. Despite the lack of any statutory reference to efficiency in § 216(b), the Court relied on concepts imported from Rule 23 to inform its decision. *Id.* at 170 ("[t]he judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged [unlawful] activity"). Similarly, the Court concluded that in the collective action context, judicial intervention and oversight may be exercised as they would under Rule 23. See *id.* at 170-73 (a court must have "managerial responsibility to oversee the joinder of additional parties to assure that the task is accomplished in an efficient and proper way").

Indeed, *Sperling* made clear that Rule 23 considerations are properly adapted and applied to the management of § 216(b) collective actions. This Court observed that Rule 23 class actions "serve important goals but also present opportunities for abuse," and that to curb this abuse, "a district court has both the duty and the broad authority to exercise control over a class action and enter appropriate orders governing the conduct of counsel and the parties." *Id.* at 171 (internal quotation marks omitted). It then stated: "*The same justifications apply in the context of a[] [§ 216(b)] action.*" *Id.* (emphasis added).

Sperling properly recognized that the benefits conferred by an appropriately certified and managed Rule 23 class action are the same as those for an appropriately certified and managed § 216(b) collective action. See *id.* at 170. Furthermore, the requirements of Rule 23(a) and those governing Rule 23(b)(3) actions—the variety most analogous to the

§ 216(b) action—would advance many of the same goals in this setting. For instance, the considerations that inform Rule 23(b)(3) certification decisions are meant to ensure that "'a class action would achieve *economies of time, effort, and expense*,'" in addition to "'uniformity of decision as to persons similarly situated'" and "'procedural fairness.'" *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615, 626 n.20 (1997) (quoting Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment) (emphasis added).

Indeed, courts frequently have acknowledged the possibility that the "similarly situated" standard might be interpreted by reference to the principles that have come to govern certification under Rule 23. See, *e.g.*, *Sperling* v. *Hoffmann-La Roche, Inc.*, 145 F.R.D. 357, 365 (D.N.J. 1992) ("it is unclear to what extent [the 'similarly situated'] requirement parallels the Rule 23 class certification requirements of commonality and typicality"), *aff'd*, 24 F.3d 463 (3d Cir. 1994); *Collins* v. *Sanderson Farms, Inc.*, 568 F. Supp. 2d 714, 721 (E.D. La. 2008) (acknowledging "significant discussion and confusion by courts about the relationship between Rule 23 and FLSA collective actions brought under § 216(b)"). However, like the court below, the majority of courts misguidedly have chosen the inherent instability of the *ad hoc* approach over the benefits of predictability that would flow from adopting the now well-developed standards that govern Rule 23 actions. See Pet. App. 54a n.36; *id.* at 55a; *Collins*, 568 F. Supp. 2d at 721. In doing so, these courts entirely ignore this Court's recognition of the importance of Rule 23 procedures in providing guidance to courts and enhancing fair outcomes in reaching certification decisions under § 216(b).

This error is compounded by the anemic standard for assessing "similarly situated" under the *ad hoc*

approach. It provides no guidance to courts, no protection to parties, no assurance of commonality, and no uniformity of result, and thus can provide no guarantee of achieving the benefits of the appropriately restrained § 216(b) collective action envisioned in *Sperling*. See 493 U.S. at 170. Without any principled basis for a decision certifying a class at the outset, there is no security that the plaintiffs certified to proceed collectively will in fact be "similarly situated." Thus, the efficiency gains that otherwise would accrue when common questions of law or fact are pursued and resolved collectively are lost. See Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment ("It is only where" "the questions common to the class predominate over the questions affecting individual members" "that economies can be achieved by means of the class-action device.").

Additionally, when a collective action is certified under the *ad hoc* approach, there inevitably are plaintiffs included in the class who are not in fact similarly situated and who have stronger or weaker cases than their fellow plaintiffs. Therefore, if the plaintiffs lose, there will be plaintiffs who are entitled to backpay, but who will not recover; if the plaintiffs win, the defendant will be forced to pay damages to plaintiffs who suffered no legal injury. This fundamental unfairness is contrary to the role this Court envisioned for managing § 216(b) collective actions to protect parties from "the potential for misuse of the class device." *Sperling*, 493 U.S. at 171-72.

In light of *Sperling*'s instruction to import Rule 23's procedural mechanisms when necessary to achieve the benefits of the collective action, there is no reason why courts are currently so rudderless in reaching

FLSA certification decisions. Indeed, this was not always the case with FLSA collective actions. The history of Rule 23(b) and § 216(b) make clear why Rule 23 was and still is an appropriate guide for FLSA certification decisions. The primary distinction between these two actions—the opt-out nature of Rule 23(b)(3) class actions resulting in a judgment binding on absent class members and the opt-in nature of the § 216(b) collective action resulting in a judgment binding only on plaintiffs who have opted-in to the action—in no way supports a conclusion that Rule 23's certification standards are fundamentally incompatible with FLSA collective actions.

As originally enacted, § 216(b) authorized employees to enforce FLSA (1) individually, (2) on their own behalf or on behalf of others similarly situated, or (3) by designating a non-employee agent or representative to sue on behalf of similarly situated employees. See Fair Labor Standards Act of 1938, ch. 676, § 16(b), 52 Stat. 1060, 1069 (codified as amended at 29 U.S.C. § 216(b)). Due to concerns regarding the manageability of FLSA suits brought by non-employees, in 1947, Congress amended § 216(b) so that only employees were proper parties to FLSA actions and that written consent was required to opt in to these actions. See Portal to Portal Act of 1947, ch. 52, sec. 5(a), § 16(b), 61 Stat. 84, 87 (codified as amended at 29 U.S.C. § 216(b)).

At that time, Rule 23 was radically different from its current iteration. Thus, far from rejecting Rule 23, the opt-in amendment to § 216(b) brought the provision *in line with* the rule, which expressly provided for "spurious" or opt-in class actions, but *not* for actions brought by non-class members. See 7A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1752 (3d ed. 2005). And,

notably, even before Congress added the express opt-in provision to § 216(b), courts had interpreted § 216(b) to mirror the spurious class action procedure of Rule 23. *E.g.*, *Pentland* v. *Dravo Corp.*, 152 F.2d 851, 853 (3d Cir. 1945). Therefore, from § 216(b)'s inception, Rule 23 guided courts making FLSA certification decisions by giving meaning to "similarly situated." See, *e.g.*, *id.*; *Kainz* v. *Anheuser-Busch, Inc.*, 194 F.2d 737 (7th Cir. 1952).

The original Rule 23 informed the "similarly situated" analysis by requiring that the representative plaintiffs "adequate[ly] represent[]" the opt-in plaintiffs and that there is a "common question of law or fact affecting the several rights and a common relief * * * sought." Fed. R. Civ. P. 23 (1938) (amended 1966); see 7A Wright & Miller, *supra*, § 1752. These requirements ensure the efficiency benefits of a class action while protecting the parties against potential unfairness. See *Amchem*, 521 U.S. at 615, 626 n.20; Fed. R. Civ. P. 23 advisory committee's note to the 1966 amendment.

With the overhaul of Rule 23 in 1966 to its modern form, "Rule 23(b)(3) 'opt-out' class actions superseded the former 'spurious' class action." *Amchem*, 521 U.S. at 615.[4] Thus, even if not every single facet of current Rule 23 applies to collective actions under § 216(b), the motivating principles underlying Rule 23 still should guide FLSA collective action

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[4] The Supreme Court's Advisory Committee notes to the amended rule parenthetically state that "[The present provisions of 29 U.S.C. § 216(b) are not intended to be affected by Rule 23, as amended.]" This note simply indicates an intent to prevent § 216(b) from being converted into an opt-out class action; moreover, the Committee did not have authority to amend the statutory class procedures. *See* Fraser, *supra*, at 115-16.

determinations. No inference can be drawn, based on the later change to Rule 23, that the congressional drafters of § 216(b) favored an entirely formless *ad hoc* approach to FLSA certification decisions or that there were no efficiency principles underlying Congress's decision to allow for FLSA collective actions. See *Woodall* v. *Drake Hotel, Inc.*, 913 F.2d 447, 451 (7th Cir. 1990) (because "[m]any of the policy reasons underlying the requirements of Rule 23(e) are applicable to [§ 216(b)] class actions," application of Rule 23's standards and concomitant "court scrutiny" are "necessary" to protect the parties in a § 216(b) collective action); *Shushan*, 132 F.R.D. at 266 ("[I]t does not seem sensible to reason that, because Congress has effectively directed the courts to alter their usual course and not be guided by rule 23's 'opt-out' feature in [§ 216(b)] class actions, it has also directed them to discard the compass of rule 23 entirely * * *.").

C. The *Ad Hoc* Approach Makes Certification Unduly Difficult To Defend And Imposes Unnecessary Costs.

The *ad hoc* approach has severe ramifications for employers. As the judgment in this case illustrates, Pet. App. 121a, collective actions under FLSA threaten employers with the risk of enormous liability, see also Pet. 22 (discussing multi-million dollar settlements); Chamber Br. 9-10 (same); Hawkins, *supra*, at 49-50 (discussing severity of risks to employers posed by FLSA collective actions). Yet, the lack of predictable standards leaves defendants with little idea which cases should be litigated through judgment, let alone which cases should be pursued in light of an initial certification at *ad hoc* stage one.

Even setting aside the expenses of settlement, which can be staggering and for some plaintiffs a complete windfall, collective action litigation is extremely costly under the two-stage *ad hoc* approach. Unlike under Rule 23, this approach allows certification under a very lenient standard at the infancy of a suit before any discovery has taken place, leaving a defendant with little meaningful opportunity to refute plaintiffs' allegations. Once the case is initially certified, notice must be provided to potential opt-in plaintiffs, and the class gains additional leverage because certification "triggers a period of lengthy discovery, which can be 'prohibitively expensive' for employers." Hawkins, *supra*, at 51. Because certification at stage one often is preordained, and a motion to decertify at stage two typically is not ripe until *merits* discovery has been completed, a defendant to a § 216(b) collective action must subject itself to substantial expense and inconvenience to have any hope of defeating certification. See Fraser, *supra*, at 121 ("When courts apply less stringent certification standards to § 216(b) actions, employers are often subject to the expense of needless discovery and are more likely to be faced with blackmail suits.").[5]

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[5] Discovery may present additional problems, as here, where courts have cherry-picked the elements of Rule 23 to import without ensuring defendants the same protections afforded by that rule. As here, Pet. App. 13a-14a, courts often deny individual discovery in § 216(b) collective actions based on decisions in the Rule 23 context that individualized discovery undermines the purpose and efficacy of the class action mechanism. *See McGrath* v. *City of Philadelphia*, No. 92-4570, 1994 WL 45162, at *2 (E.D. Pa. Feb. 10, 1994); *Adkins* v. *Mid-Am. Growers, Inc.*, 141 F.R.D. 466, 468 (N.D. Ill. 1992). But, unlike in the Rule 23 context, *there is no initial safeguard that the named plaintiffs are typical of or can adequately represent*

This starkly contrasts with the Rule 23 context. Under Rule 23, there is no possibility of certification at the outset of litigation, and thus settlement pressures are diminished. Moreover, discovery frequently is bifurcated in Rule 23 cases and limited to class issues at the beginning of the litigation. Therefore, a defendant has a far more realistic idea of the financial burden and inconvenience it will incur before a certification decision is obtained.

Finally, the lack of an appellate vehicle similar to Rule 23(f) considerably increases the expense to defendants following either a stage one or a stage two certification decision. If a defendant believes that a § 216(b) certification decision is erroneous, its only avenue of relief is to proceed through trial to judgment. Especially when combined with the availability of attorneys' fees for plaintiffs' counsel under the statute, see Hawkins, *supra*, at 55, the absence of meaningful appellate review for defendants alleviates any pressure on plaintiffs to settle a collective action even where they know the certification likely was improper.

Because these negative consequences of the current approach to § 216(b) litigation cannot be remedied through the two-stage *ad hoc* approach, this Court's intervention is essential.

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the opt-in plaintiffs for discovery purposes. Therefore, if, as here, the limited discovery is not based on a representative sample, the discovery cannot reveal anything about whether the plaintiffs are "similarly situated." *See* Pet. App. 13a ("order authorized *Plaintiffs to select* 250 opt-ins for Family Dollar to depose in-person" (emphasis added)). For the efficiency gains of Rule 23's approach to discovery to be realized, the § 216(b) certification decision must be informed by the principles underlying that rule to ensure a truly "similarly situated" class.

II. THE ELEVENTH CIRCUIT'S INDIVIDUALIZED EXCEPTION HOLDING CREATES MORE UNCERTAINTY AND PUNISHES DEFENDANTS FOR EFFICIENT BUSINESS PRACTICES.

In addition to the overarching need for this Court's review to bring clarity to the amorphous collective action certification standards that now predominate, the Eleventh Circuit's resolution of petitioner's statutory exemption defense further impairs employers' and counsel's ability to assess the likelihood that plaintiffs' claims may proceed as a collective action. In passing on the defense without undertaking the individualized inquiries required by federal regulation, see, *e.g.*, 29 C.F.R. § 541.700(a), the court below not only made defending against certification more unpredictable, it established a rule that will punish defendants for run-of-the-mill, efficient business practices. Moreover, because the resolution of petitioner's individualized exemption defenses in collective fashion so widely departs from FLSA case law to date, the Eleventh Circuit stands to become the forum of choice for collective actions. Given the ease with which plaintiffs can file nationwide (and other) collective actions within the Eleventh Circuit and the general barriers to obtaining appellate review of § 216(b) certification questions, this Court's opportunities to review the certification issues presented here likely will be rare.

Even though the *ad hoc* standard inherently increases the number of collective actions, one consistent brake on the expansion of § 216(b) has been the refusal of courts to certify a case when the defendant asserted one of the various individualized exemption defenses provided by the FLSA. See Pet. 17-18 (collecting cases rejecting certification based on

employers' reliance on defenses requiring individualized inquiries into each plaintiff's job duties). Federal law requires that a number of FLSA exemption defenses, like the executive exemption petitioner asserted, be "determined on a case-by-case basis," 29 C.F.R. § 541.106(a) (executive employees); *id.* § 541.302(c) (creative professional status); see also *id.* § 541.700(a) (requiring that "primary duty" be determined for exemption purposes "based on all the facts in a particular case"); *id.* § 541.202(b) (administrative exemption depends on analysis of "all the facts involved in the particular employment situation"). Given the necessarily fact-intensive inquiries required by the regulations, the majority of courts correctly recognize that the notion of a "collective action" based on purportedly "similarly situated" plaintiffs is irreconcilable with such individualized defenses. See Pet. 17-18 (collecting cases); *accord, Keef* v. *M.A. Mortenson Co.*, No. 07-CV-3915(JMR/FLN), 2009 WL 465030, at *2-3 (D. Minn. Feb. 24, 2009) (denying certification where defendant raised an administrative exemption defense, and recognizing that "[t]he regulations clearly contemplate an individualized inquiry into each plaintiff's job responsibilities"). Indeed, in considering a collective action involving petitioner's same business practices and exemption defenses that were before the Eleventh Circuit, another court expressly held that "[a] collective action is never appropriate for situations where a court must make an individual determination of each plaintiff's day-to-day activities." *Grace* v. *Family Dollar Stores, Inc.*, No. 3:06CV306, 2007 WL 2669699, at *3 (W.D.N.C. Sept. 6, 2007).

Consistent with these principles, the court below acknowledged that the exemption defenses presented

"'an inherently fact-based inquiry' that depends on the many details of the particular job duties and actual work performed by the employee seeking overtime pay.'" Pet. App. 64a (citation omitted). Nevertheless, the Eleventh Circuit broke from the line of authority noted above by concluding that the individualized defenses did not preclude certification. *Id.* at 64a-65a. It reasoned that because "Family Dollar applied the executive exemption across-the-board to every store manager" in the first instance, petitioner's otherwise fact-based exemption defenses instead could be resolved collectively. *Id.*

This mode of analysis will have a dramatic impact on national employers with operations in the Eleventh Circuit. As *amici* have recognized, businesses regularly classify their employees in a uniform fashion across a given job description for the purposes of FLSA eligibility. See Nat'l Retail Fed. Br. 16-18; Chamber Br. 13; *accord*, Maureen Knight, *Why Defense Counsel Should Be Aware of the Growing Trend of FLSA Collective Actions*, The Job Description, Spring 2004, at 22-23, *available at* http://www.dri.org/ContentDirectory/Public/Newsletters/0080/2004%20Employment%20Law%20Committee%20The%20Job%20Description%20Spring.pdf. Using uniform job descriptions and classifications is efficient and beneficial for both the companies and their employees. See generally Jane Howard-Martin & Grace E. Speights, Practicing Law Inst., No. H0-00LU, *Preventing, Defending and Settling Discrimination Class Actions and FLSA Collective Actions* 743 (2003).

For instance, the company-wide job descriptions upon which these classifications are based ensure that the employer has carefully considered what tasks employees in a given position are expected to

fulfill. Doing so provides an objective standard through which to evaluate employees, determine their compensation and bonuses, and to assess promotions. At the same time, these job descriptions provide employees with notice of the criteria they are expected to meet, benchmarks for assessing performance, and guidance about how to supervise employees who report to them. Additionally, these descriptions allow employees (and their employers) to monitor whether they are being treated fairly with respect to their wages, responsibilities, and opportunities for advancement because they can compare their experiences to other individuals who share their job title. Moreover, consistent company-wide job descriptions enhance employees' freedom of mobility between company locations should they desire or be required to transfer. Any alternative to their use would be impractical and inefficient.

Despite these benefits for employers and employees, the Eleventh Circuit's rule creates a perverse incentive against using written job descriptions and classifications. Under the decision below, the propriety of a routine and beneficial aspect of doing business has been called into doubt simply because the procedures—which employers acknowledge may be subject to exceptions for particular employees or at specific locations—are drafted to govern the many, not the few. Employers thus run the risk that such policies will be used against them in litigation, or that, as here, they foreclose employers from drawing upon the defenses to which they otherwise would be entitled under federal law. As a consequence, counsel are placed in the awkward position of weighing the benefits of written policies in various legal contexts (*e.g.*, responding to claims of discrimination based on

failures to promote, etc.) versus their detriment in others like that here.

The costs and inefficiencies embodied in the Eleventh Circuit's *ad hoc* approach are reason enough to warrant this Court's review. What makes review now essential is that even identically classified employees are being treated differently by different courts. Litigation that turns solely on geography is the quintessential situation that calls for intervention by this Court.

CONCLUSION

For all these reasons, and those stated by petitioner, the petition should be granted.

Respectfully submitted,

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